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FILED
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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1970

NO. ~~91~~

JOSEPH ARTHUR ZICARELLI,

Appellant,

vs.

THE NEW JERSEY STATE COMMISSION OF INVESTIGATION

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

FILED FEBRUARY 16, 1970

PROBABLE JURISDICTION NOTED MARCH 1, 1971

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Chronological List of Important Dates

- 7/8/69 Zicarelli first appears before State Commission of Investigation, pursuant to subpoena dated 6/12/69, and is directed to return on July 10.
- 7/10/69 Zicarelli appears before Commission, is questioned and refuses to answer most questions. He is excused until August 20, 1969.
- 8/19/69 Commission passes resolution authorizing statutory grant of immunity to Zicarelli.
- 8/20/69 Zicarelli appears before Commission, is granted immunity and refuses to testify.
- 8/20/69 Commission Chairman files a verified petition with Superior Court asking that Zicarelli be ordered to show cause why he should not be adjudged in contempt and committed to jail until he testifies.
- 8/20/69 Judge Kingfield of the Superior Court issues Order to Show Cause.
- 9/16/69 Hearing before Judge Kingfield on the Order to Show Cause.
- 9/18/69 Hearing continued before Judge Kingfield on the Order to Show Cause. Judge Kingfield finds Zicarelli in contempt and orders him committed to jail until he purges himself by testi-

Chronological List of Important Dates

- fyng as ordered. Commitment is stayed pending appeal.
- 9/22/69 Order is entered in accordance with ruling of September 18.
- 9/23/69 Notice of Appeal filed.
- 12/15/69 Case argued before Supreme Court of New Jersey.
- 1/20/70 Judgment affirmed by Supreme Court of New Jersey.
- 1/29/70 Notice of Appeal filed with Supreme Court.
- 2/16/70 Jurisdictional Statement filed.
- 3/2/71 Probable Jurisdiction noted.

Subpoena**STATE COMMISSION OF INVESTIGATION****STATE OF NEW JERSEY****TRENTON, NEW JERSEY****IN THE NAME OF THE PEOPLE OF THE STATE
OF NEW JERSEY****TO: JOSEPH ZICARELLI, 551 Brandon Place
Cliffside Park, New Jersey**

Subpoena

You are hereby commanded to appear and attend before the STATE COMMISSION OF INVESTIGATION, STATE OF NEW JERSEY, at State Commission of Investigation, 329 West State Street, Trenton, New Jersey on the 8th day of July, 1969 at 10:00 o'clock in the forenoon, and on any adjourned dated thereof, to testify and give evidence as a witness at an Executive Hearing to be held in connection with an investigation conducted pursuant to Section 12, Chapter 266 of the 1968 Laws of the State of New Jersey, N.J.S. 52:9M-12.

A GENERAL STATEMENT of the subject of investigation being:

Whether the laws of New Jersey are being faithfully executed and effectively enforced in the City of Long Branch, New Jersey, with particular reference to organized crime and racketeering; whether public officers and public employees in the City of Long Branch and in Monmouth County where it is located, have been properly discharging their duties with particular reference to law enforcement and relations to criminal elements; and whether and to what extent criminal elements have infiltrated the political, economic and business life of those areas.

FAILURE TO ATTEND AND TO PRODUCE the items herein specified may subject you to contempt proceedings and to such other penalties as are prescribed by law.

WITNESS, Andrew F. Phelan, Executive Di-

Subpoena

rector for and on behalf of the STATE COMMISSION OF INVESTIGATION, STATE OF NEW JERSEY, this 12th day of June, 1969.

NOTICE TO WITNESS: In accordance with the provisions of Section 2, Chapter 376 of the 1968 laws of the State of New Jersey, N.J.S. 52:13E-2 of the Act establishing a code of fair procedure to govern state investigating agencies, you are herewith and hereby personally served with a copy of said act, a copy of the full text and provisions of which are set forth on the reverse side of this Subpoena.

NO. 130

Excerpts of Transcript of Proceedings**STATE OF NEW JERSEY****STATE COMMISSION OF INVESTIGATION**

**IN THE MATTER OF THE INVESTIGATION OF
LONG BRANCH AND MONMOUTH COUNTY, NEW
JERSEY, WITH RELATION TO THE INFLUENCE
OF ORGANIZED CRIME AND CORRUPTION IN
THAT AREA.**

EXECUTIVE SESSION

Testimony of:
JOSEPH A. ZICARELLI

State House Annex
Trenton, New Jersey
August 20, 1969

*Excerpts of Transcript of Proceedings***BEFORE:**

WILLIAM F. HYLAND, CHAIRMAN
GLEN B. MILLER, JR., MEMBER

APPEARANCES:

ANDREW F. PHELAN, ESQ., Executive Director of the Commission.

GARY GARDNER, ESQ., Counsel to the Commission.

GEORGE P. DOYLE, ESQ., Counsel to the Commission.

MICHAEL A. QUERQUES, ESQ., on behalf of Joseph A. Zicarelli.

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[2] Whereupon,

JOSEPH A. ZICARELLI

recalled, previously sworn, testified as follows:

Chairman Hyland: The record will show the appearances of Commissioner Miller and myself, Commissioner Hyland, and that this is a continuation of a series of private hearings held by the Commission pursuant to a resolution adopted July 2, 1969. The record will show the presence of Mr. Doyle and Mr. Gardner as counsel to the Commission, the witness Joseph A. Zicarelli. Counsel, may we have your appearance.

Mr. Querques: Yes. My first name is Michael, middle initial A., last name Querques; address 501 Central Avenue, Orange.

Chairman Hyland: In what town?

Mr. Querques: Orange.

Chairman Hyland: Now, Mr. Zicarelli, when you were here previously you were represented by Daniel E. Isles, as I recall, is that correct?

The Witness: Yes.

Chairman Hyland: Do I understand now that your attorney with whom the Commission will deal in [3] the future is not Mr. Isles but is Mr. Querques?

Chairman Hyland: I want to hear it from the witness.

The Witness: Yes, sir.

Chairman Hyland: Because there are occasions when we will have to be in touch with counsel and I want to be sure that the

Excerpts of Transcript of Proceedings

witness understands that you are authorized to deal with us for him.

Mr. Querques: I think Mr. Zicarelli will tell you that any correspondence, any communication should be limited to myself and that the only reason why Mr. Isles appeared with Mr. Zicarelli on the last occasion or occasions was because I was in Europe and there was no way in the world I could get back but hereafter it will be strictly myself.

Chairman Hyland: Are you associated with Mr. Isles?

Mr. Querques: He is a law partner of mine but Mr. Zicarelli does not want him under any circumstances to ever be present with him and to represent him.

[4] Chairman Hyland: All right. That is not our responsibility. That is Mr. Zicarelli's.

Mr. Querques: Yes, but I thought if you wanted it on the record he would confirm what I told you.

Chairman Hyland: Mr. Zicarelli, you recall that you were previously sworn in the course of this investigation. Do you understand that your testimony today will be under that continuing oath?

The Witness: Yes, sir.

Chairman Hyland: All right, Mr. Gardner.

Direct Examination by Mr. Garner:

Q. Mr. Zicarelli, since your appearance before the Commission on July 10, 1969, have you spoken to

Excerpts of Transcript of Proceedings

anyone other than your attorney or attorneys regarding your testimony before the Commission?

Mr. Querques: I would advise Mr. Zicarelli not to answer that question for the reason that the question would not seem to be pertinent to the inquiry but I do think that he can tell you that if he was given any instructions, to the best of his ability he followed through with them.

[5] Chairman Hyland: Why don't we have him say that, Mr. Querques? I think there is no question it is pertinent because he was instructed not to discuss his previous testimony. Mr. Zicarelli, I am going to have this question repeated and ask you to answer it. Let's have the question repeated so that you fully understand it.

(The question was read by the Reporter.)

A. Not that I recall, no.

Q. Are you a member of any secret organization that is dedicated to or whose principle is to pursue crime and protect those of its members who do commit crime?

Mr. Querques: Mr. Chairman, with respect to this, and being appreciative of the fact that you may have gone through this before, but asking you to be appreciative of the fact that I was not present, may I respectfully and in very short fashion say that I have advised Mr. Zicarelli as to his rights but that as his attorney I think there

Excerpts of Transcript of Proceedings

are certain legal statements that I should make for the record. We take this position: That, first of all, the entire statute which is known as NJS 52:9M, Sections 1 through 17, are unconstitutional. [6] The second argument we would make, without spelling it out, is that even though the statute may be considered by the courts ultimately as being constitutional, that the implementation of those statutes is unconstitutional in that the subpoena process and the questioning process which took place before and which will take place today violate the witness' constitutional rights. Specifically, and without giving you any argument now but just listing them, but specifically with respect to the First Amendment and the witness' right of association; secondly, with respect to the Fourth Amendment and the witness' right of privacy; thirdly, with respect to the Fifth Amendment and the witness' rights under that amendment to be indicted if he is thought to have committed a crime, secondly under that precise section not to be compelled to be a witness against himself and thirdly under that specific section that he should not be deprived of any life, liberty or property without due process of law. The next part or the fourth part under the second argument that I make is that [7] it is a violation of the Sixth Amendment in that he is denied a trial by an impartial jury, he is denied the right to know the nature and cause of the accusation made against him, he is denied the right of confrontation, he is denied the right of com-

Excerpts of Transcript of Proceedings

pulsory process and he is denied the right of assistance of counsel.

Chairman Hyland: How is he deprived of assistance of counsel?

Mr. Querques: Well, he is denied, sir, the right of assistance of counsel in that if the proceeding is deemed to be in the nature of an accusation, he is denied the right of counsel in that counsel, while he is at Mr. Zicarelli's side, does not have the right to cross-examine anyone, he does not have the right to produce a witness, to produce evidence in his own behalf, so while counsel is here, counsel is in a legal way somewhat useless because he cannot bring all his talents to bear on the problem, so in that fashion I say that he is denied the effective assistance of counsel.

Chairman Hyland: Proceed.

[8] Mr. Querques: With respect to the statute which does not pertain at the present time, depending upon whether certain sections of the statute are enforced or attempted to be used against him, I think we can adequately argue under the Eighth Amendment that if the contempt processes are used it would amount to cruel and unusual punishment in violation of the Eighth Amendment. And lastly I say, most respectfully, that there is a violation here of the Fourteenth Amendment, due process clause. The third point we would like to make, without again spelling it out at length, unless you choose to question me about it, at which point I will be happy to give you answers, but we maintain that the statute is unconstitutional because of the immunity

Excerpts of Transcript of Proceedings

section. That immunity section, briefly, does not confer immunity with respect to any federal crime, it does not confer immunity with respect to any sister state crime, it does not confer immunity, if you please, with respect to any crime that could have been committed in another state. There is no provision in the statute to [9] prevent the attenuative use of any answer here given. As a matter of fact, the statute obligates the Commission to turn any answers or any evidence procured here over to other prosecuting authorities, including the federal, including sister states, and certainly to the New Jersey Attorney General and to any prosecutor in the state that could possibly use the information. With respect to the scope of this inquiry, based upon the questions that were asked of Mr. Zicarelli the last time as set forth to me, I would say that any questions along those same lines — most of them, if not all of them — would be beyond the scope of the inquiry as set forth, first of all, in the subpoena and, secondly, as set forth in the Commission's resolution. I think, sir, that that is all I would have to say at this time with respect to any constitutional objection that we would have regarding proceeding in this matter.

Chairman Hyland: Mr. Quérques, I think you can presume quite safely that the Commission has given consideration to many of the legal [10] arguments that you are raising at this time and, in fact, many of them, if not all of them, have been raised by other

Excerpts of Transcript of Proceedings

counsel in other proceedings. It isn't our function, obviously, to determine our own constitutionality. The Commission is operating to the best of its ability with its staff, with able counsel, in my opinion, operating thoroughly and within the framework of the legislative responsibilities that have been given to us. So I will explain at this time that we will proceed and your objection will of course be noted and that there will be a series of questions that Mr. Zicarelli will be asked. If it is his intention, as you have indicated, to refuse to answer those questions on the basis of his Fifth Amendment privilege, or whatever, after the first several questions we will try to shortcut that so that he can answer it in a shorter fashion and, by the same token, the directives I will give on behalf of the Commission with respect to the conferring of immunity will be shortcut.

Mr. Querques: I'm sorry, sir?

[11] Chairman Hyland: What I am trying to say, if we want to save time, Mr. Zicarelli's answers after we have received several, we will permit him to shorten those answers to "same answer," for example, if that is what he intends to convey. I want to explain on behalf of the Commission the implications of what we propose to do today and you will be given a copy at this time of what has been marked as Exhibit C-1 for today, which details the implications of the proposed grant of immunity. So, Mr. Zicarelli, when you are directed by me on behalf of the Commission to answer a question that

Excerpts of Transcript of Proceedings

you have refused to answer, upon compliance with the Commission's order to answer the question you shall be immune from having such responsive answer given by you or evidence derived therefrom used to expose you to criminal prosecution or penalty or to a forfeiture of your estate, except that you may nevertheless be prosecuted for any perjury committed in such answer or for contempt for failing to give a responsive answer in accordance with the order of the Commission, and any such answer given shall be [12] admissible against you upon any criminal investigation, proceeding or trial against you for such perjury or upon any investigation, proceeding or trial against you for such contempt. Now, your counsel has a copy of that. I want you to familiarize yourself with it and confer with counsel if you care to do so.

Mr. Querques: Mr. Chairman, may I have a moment to confer with Mr. Zicarelli? But before I do, may I ask you, respectfully, whether or not we will receive a copy of the transcript now being taken so as to in the future be prepared to explain why we may have taken a certain position with respect to certain questions inasmuch as you have indicated that the Commission is prepared to confer immunity.

Chairman Hyland: The answer to that will be yes, that you will be provided with a copy but at your own expense.

Mr. Querques: Right. And is it up to me to order it?

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Chairman Hyland: You can make those arrangements with Mr. Miele or his associate, Mr. Reading.

[13] Mr. Querques: Now, sir, just one last question. This document which has been marked Exhibit C-1, from which I think you have read the warning to Mr. Zicarelli, am I correct that it is from the statute known as 52:9M-17?

Chairman Hyland: Mr. Gardner.

Mr. Querques: Or, as you have it, Chapter 266 of the Laws of New Jersey 1968, Section 17?

Mr. Gardner: Is the question whether that is a verbatim excerpt from that statute?

Mr. Querques: Yes. It seems that it is.

Chairman Hyland: I assume that it would involve not only Chapter 266 of the laws of 1968 but Chapter 67 of 1969, or am I incorrect in my recollection of the amendment?

Mr. Gardner: I believe that is not an exact excerpt from the statute. However, I think —

Commissioner Miller: I have here, Mr. Querques, a copy of Section 17, if you care to look at it.

Mr. Querques: I have it, too, and I take it if the language is not verbatim it certainly is substantially the same.

[14] Chairman Hyland: What you have requested counsel for the Commission to do is furnish you with an explanation of the implications of the proposed grant of immunity as drawn from their analysis of the statute creating the Commission, which is Chapter 266.

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Mr. Querques: Yes. Well, that is what I am asking, is it an analysis or is the language essentially extracted from the statute?

Chairman Hyland: You will have to draw your own conclusions.

Mr. Querques: It strikes me as being extracted right from Section B of 52:9M-17.

Chairman Hyland: You draw your own conclusions about that, Mr. Querques.

Mr. Querques: All right. I think Mr. Gardner said it was substantially the same.

Chairman Hyland: I think the statute and the statement, C-1, will speak for themselves, so make whatever conclusions you want. Now, Mr. Miele, we will return to the question as posed to Mr. Zicarelli.

(The question was read by the Reporter.)

Chairman Hyland: What is your answer?

The Witness: On the advice of counsel I [15] invoke all my rights under the United States Constitution, especially my rights under the Fifth Amendment. Therefore I respectfully decline to answer the question on the ground it may tend to incriminate me.

Chairman Hyland: Are you finished?

The Witness: Yes.

Chairman Hyland: Now, I have given you the explanation and provided you with a copy of Exhibit C-1, which deals with the power of the Commission to award immunity, and based upon the immunity provision of the statute I am now directing you, Mr. Zicarelli, to answer that question.

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Mr. Querques: In connection with that, Chairman Hyland, may I ask you respectfully, in accordance with the law as I understand it, to explain the question to Mr. Zicarelli so that he and I both, for that matter, can understand the connective reasoning by which the answer to that question would be pertinent to your inquiry.

Chairman Hyland: No.

Mr. Querques: And with respect to that, sir, may I say that I believe that the authority [16] for asking you to do this would be contained in the case of Watkins against United States, reported at 354 U.S. 178, also at 1 Lawyers Edition 2d 1273, and to the same effect is the case of Scull against Virginia, reported in 359 U.S. 344 and 3 Lawyers Edition 2d 865 and, if I may, just one short excerpt out of Watkins says, reading from Page 1299 of 1 Lawyers Edition 2d, "It is the duty of the investigative body upon objection of the witness on the grounds of pertinency to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto. To be meaningful the explanation must describe what the topic of the inquiry is and the connective reasoning whereby the precise questions asked relate to it." That is the basis upon which I ask you to explain it to me, sir, because, frankly, I don't understand it myself. I am in no position to explain it to him because, as I understand it, the investigation is confined to a geographical area known as Monmouth

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County.

Commissioner Miller: We are looking into [17], organized crime in Long Branch and in Monmouth County and this question is directed toward organized crime. Does that answer your question?

Mr. Querques: I understand that from the question itself but I don't see how Mr. Zicarelli's answer would relate to Monmouth County or to Long Branch.

Commissioner Miller: We have a series of questions and it will be connected up as we go along.

Mr. Querques: As we go along I would ask you to explain so that perhaps at the end it will become apparent because from the single question it does not seem apparent.

Commissioner Miller: If at the end there is still any doubt remaining in your mind, we can discuss the matter then.

Mr. Querques: All right, sir.

Chairman Hyland: Now, based upon the immunity provisions of the statute, Mr. Zicarelli, I am directing you to answer that question. What is your response?

The Witness: I refuse to answer for the same reasons.

[18] Chairman Hyland: Mr. Gardner.

By Mr. Gardner:

Q. Do you know that organization by the name Cosa Nostra?

A. I invoke all my rights under the United States Constitution and especially my rights under the Fifth Amendment, therefore I respectfully decline

Excerpts of Transcript of Proceedings

to answer the question on the ground it may tend to incriminate me.

Chairman Hyland: And for the reasons that I have explained before with respect to the immunity provisions, Mr. Zicarelli, I direct you on behalf of the Commission to answer that question. Do you refuse for the same reason?

The Witness: Yes, sir. V

Q. Mr. Zicarelli, I will ask you to speak up; I am having a lot of difficulty hearing you.

A. I will try.

Q. Are you a member of the organization known as Cosa Nostra?

Chairman Hyland: Now if you choose to make the same answer, Mr. Zicarelli, from this point on you can merely say "same reasons" and we will accept that, subject to the permission of your counsel, as being the [19] equivalent of the earlier answer you gave. Is that satisfactory?

Mr. Quergues: That is satisfactory. I think it is clear from the record that we all understand that whatever constitutional objections I have made are incorporated in Mr. Zicarelli's answer.

Chairman Hyland: All right. Now, with that explanation, Mr. Zicarelli, as to the Question that has been asked of you, what would your answer be?

The Witness: I refuse for the same reason.

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Chairman Hyland: Same answer?

The Witness: Yes.

Chairman Hyland: I direct you to answer on the same basis, Mr. Zicarelli.

The Witness: I refuse.

Chairman Hyland: Same answer?

The Witness: Yes.

Q. Do you have Cosa Nostra responsibilities in Monmouth County?

A. The answer is the same.

Chairman Hyland: I direct you to answer for the same reason.

The Witness: My answer is the same.

[20] Q. Have you ever visited Monmouth County?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Still the same.

Q. Did any such visits involve Cosa Nostra activities?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Have you ever conducted any Cosa Nostra business in Monmouth County?

A. Same answer.

Excerpts of Transcript of Proceedings

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Chairman Hyland: May I ask you a question at this point, Mr. Zicarelli. Have you ever heard the term "Cosa Nostra" used?

The Witness: Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

Chairman Hyland: What is your understanding [21] of the meaning of the term "Cosa Nostra"?

The Witness: My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. In whose family of Cosa Nostra are you a member?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

Q. Do you know Joseph Bonanno?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Have you ever known Joseph Bonanno?

A. Same answer.

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Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Are you now or have you ever been a member of Joseph Bonanno's Cosa Nostra Family?

A. My answer is the same.

Chairman Hyland: I direct you to answer on [22] the same basis.

The Witness: Same answer.

Q. Have you ever met with or spoken to Joseph Bonanno?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Have you ever met with or spoken to Carmine Galante?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Are you now or have you ever been a member of the Carlo Gambino Family?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Excerpts of Transcript of Proceedings

Q. Do you now or have you ever known Carlo Gambino?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

[23] The Witness: Same answer.

Q. Have you ever met with or spoken to Carlo Gambino?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis and, Mr. Zicarelli, will speak up so that we can all hear you, please.

The Witness: My answer is the same.

Chairman Hyland: Proceed.

Q. Have you ever met with or spoken to Paul Castellano?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Have you ever met with or spoken to Paolo Gambino?

Mr. Querques: May I have that first name?

Mr. Gardner: P-a-o-l-o.

A. My answer is the same.

Chairman Hyland: I direct you to answer

Excerpts of Transcript of Proceedings

on the same basis.

The Witness: Same answer.

Q. Have you ever met with or spoken to a Carmen Lombardozzi?

[24] A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Have you ever met with or spoken to Joseph Stacci, also known as Joe Rogers?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Are you now or have you ever been a member of the Vito Genovese Family?

A. My answer is still the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Have you ever met with or spoken to Vito Genovese?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

Excerpts of Transcript of Proceedings.

Q. Have you ever met with or spoken to Thomas Eboli, also known as Tommy Ryan?

A. My answer is the same.

[25] Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Have you ever met with or spoken to Gerardo Catena, also known as Jerry Catena?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Have you ever met with or spoken to Ruggerio Boiardo, also known as Richie the Boot?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same.

Q. Have you ever met with or spoken to Anthony Boiardo, also known as Tony Boy?

A. Same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

Q. Have you ever met with or spoken to Joseph Valachi, also known as Cago?

A. My answer is the same.

Excerpts of Transcript of Proceedings

Chairman Hyland: I direct you to answer on [26] the same basis.

The Witness: Same answer.

Q. Have you ever met with or spoken to Carmine Persico, Jr.?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Have you ever met with or spoken to Pasquale Erra, also known as Patsy, also known as Little Patty?

Mr. Querques: May I have the spelling for Erra, please?

Mr. Gardner: E-r-r-a.

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same, sir.

Q. Have you ever met with or spoken to Harold Konigsberg, also known as Kayo?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

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Q. Have you ever met with or spoken to Angelo DeCarlo, also known as Gyp, also known as Ray?
[27] A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

Q. Are you now or have you ever been a member of the Sam DeCavalcante Family of Cosa Nostra?
A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

A. Have you ever met with or spoken to Sam DeCavalcante, also known as Sam the Plumber?
A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same.

Q. Have you ever met with or spoken to Frank Cocchiaro, also known as Frank Condi?
A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Do you know the present whereabouts of Frank Cocchiaro?
A. My answer is the same.

Excerpts of Transcript of Proceedings

[28] Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Have you seen Frank Cocchiaro since he testified before this Commission.

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Have you ever met with or spoken to Robert Occhipinti, also known as Bobby Basile?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

Q. Have you ever met with or spoken to Anthony Russo, also known as Little Pussy?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Do you know any of the above-named individuals to be members of the Cosa Nostra?

A. My answer is the same, sir.

Chairman Hyland: I direct you to answer on [29] the same basis.

The Witness: Same answer.

Excerpts of Transcript of Proceedings

Q. Do you know any of those above-named individuals to have conducted Cosa Nostra activities in Monmouth County?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Do you know any of those above-named individuals to have Cosa Nostra responsibilities in Monmouth County?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is still the same.

Q. Have you ever given any of the above-named individuals orders to be carried out in Monmouth County?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is still the same.

Q. Have any of those above-named individuals ever given you orders to be carried out in Monmouth County?

A. My answer is the same.

[30] Chairman Hyland: I direct you to answer on the same basis.

Excerpts of Transcript of Proceedings

The Witness: Still the same..

Q. Do you know that Long Branch, New Jersey is situated in Monmouth County?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Have you ever spoken to any public officials in Long Branch, New Jersey?

A. My answer is still the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

Q. Have you ever spoken to any of them about the performance of their official duties?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Have you ever given anyone orders to speak to public officials in Long Branch, New Jersey about the performance of their official duties?

A. Same answer.

[31] Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Excerpts of Transcript of Proceedings

Q. Have you ever paid any money or authorized payment of any money to any public officials in Long Branch, New Jersey?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Still the same.

Q. Do you know of the payment of any money to public officials in Long Branch, New Jersey?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Still the same.

Q. Do you know of the payment of any money to public officials in Long Branch?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

Q. How long have you been a member of Cosa Nostra?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. What rank do you hold?

A. Same answer.

Excerpts of Transcript of Proceedings

Chairman Hyland: I direct you to answer on [32] the same basis.

The Witness: Same answer.

Q. In what geographical area do you have Cosa Nostra responsibilities?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Still the same answer.

Q. Is Monmouth County within that geographical area?

A. Still the same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

Q. Within the hierarchy of the Cosa Nostra who is your immediate superior?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Still the same.

Q. Who do you have working for you in Cosa Nostra?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is still the

Excerpts of Transcript of Proceedings

same.

[33] Q. Do any of those people who are subservient to you reside in Monmouth County?

A. My answer is still the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Still the same.

Q. Do any of your superiors in Cosa Nostra reside in Monmouth County?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer, sir.

Q. Is Anthony Russo a member of Cosa Nostra?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Is Frank Cocchiaro a member of Cosa Nostra?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Is Robert Occhipinti a member of Cosa

Excerpts of Transcript of Proceedings

Nostra?

A. My answer is the same.

Chairman Hyland: I direct you to answer on [34] the same basis.

The Witness: Same answer.

Q. Is Bobby Basile a member of Cosa Nostra?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Is Louis Ferrari a member of Cosa Nostra?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

Q. Have you ever met with or spoken to Louis Ferrari?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Have you ever met with or spoken to Anthony Agnellino, also known as Tony Dale?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

Excerpts of Transcript of Proceedings

The Witness: My answer is the same.

Q. Is he a member of Cosa Nostra?

[35] A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Have you ever met with or spoken to Atilio Agnellino, also known as Artie Agnellino?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Is he a member of Cosa Nostra?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. I have just asked you about Anthony Russo, Frank Cocchiaro, Robert Occhipinti, also known as Bobby Basile, Louis Ferrari, Anthony Agnellino and Atilio Agnellino. Do any of those individuals have Cosa Nostra responsibilities in Monmouth County?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Excerpts of Transcript of Proceedings

Q. How many families of Cosa Nostra are there [36] represented in Monmouth County?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Is it part of Cosa Nostra's activities and aims to corrupt politicians in Monmouth County and in Long Branch?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. In the terminology of Cosa Nostra do you know the meaning of the term "ice"?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. What is the meaning of the term "ice"?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Without giving specific examples, can you tell me whether you know of payments of ice to any [37] individuals in Long Branch, New Jersey?

Excerpts of Transcript of Proceedings

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Do you exercise any power in any labor unions situated in Monmouth County?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Chairman Hyland: Or in any way with unions, Mr. Zicarelli, that have activities in Monmouth County?

The Witness: My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

Q. Is it part of the function of members of Cosa Nostra to insinuate themselves into the hierarchy of labor unions in Monmouth County?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same, sir.

[38] Q. Is it part of the function of members of Cosa Nostra to invest monies in ostensibly legitimate businesses in Monmouth County?

A. My answer is the same.

Excerpts of Transcript of Proceedings

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. In the normal course of affairs do members of Cosa Nostra give orders directly to people who are not members of Cosa Nostra?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Within the terminology of Cosa Nostra what does the term "family" mean?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. What does the term "griemeson" mean?

Mr. Querques: May I have the spelling of that?

Mr. Gardner: G-r-i-e-m-e-s-o-n.

Mr. Querques: Is that an English word or [39] foreign word?

Mr. Gardner: Perhaps your client can tell us.

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

Excerpts of Transcript of Proceedings

The Witness: Same answer.

Q. In the jargon of Cosa Nostra what does the term "boss" mean?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. What does the term "underboss" mean?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

Q. What does the term "caporegima" mean?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. What does the term "consigliari" mean?

A. My answer is the same.

Chairman Hyland: I direct you to answer on [40] the same basis.

The Witness: Same answer.

Q. What does the term "lieutenant" mean?

A. My answer is the same.

Chairman Hyland: I direct you to answer

Excerpts of Transcript of Proceedings

on the same basis.

The Witness: Same answer.

Q. What does the term "soldier" mean?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Within the terms of Cosa Nostra what does the term "commission" mean?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Which of the members of the commission of the Cosa Nostra can you identify?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Who is the boss of your Cosa Nostra Family?

[41] A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Who is the underboss?

A. Same answer.

Excerpts of Transcript of Proceedings

Chairman Hyland: I direct you to answer on the same basis

The Witness: Same answer.

Q. Who is the consigliari?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

Q. Who is the caporegima to whom you are responsible?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Q. Which of the members of the hierarchy of your family just asked about reside in Monmouth County?

A. The answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

[42] The Witness: Same answer.

Q. Which of them conduct business in Monmouth County?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Excerpts of Transcript of Proceedings

Q. Which of them have influence in labor unions in Monmouth County?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

Q. Which of them have Cosa Nostra responsibilities in Monmouth County?

A. Same answer.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

Q. Have you ever told anyone you are a member of Cosa Nostra?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

[43] Q. Have you ever talked to anyone in such a way as to suggest that you were a member of Cosa Nostra?

A. My answer is the same.

Chairman Hyland: I direct you to answer on the same basis.

The Witness: My answer is the same.

Q. Are you also known as Bayonne Joe?

A. My answer is the same.

Excerpts of Transcript of Proceedings

Chairman Hyland: I direct you to answer on the same basis.

The Witness: Same answer.

Mr. Phelan: Mr. Chairman, that will complete our questions at this time. However, on the record, I would like the record to reflect that I am now serving on Mr. Querques an order to show cause and petition requesting adjudication of contempt for Mr. Zicarelli, also incarceration until such time as he answers the questions which have been propounded to him. The order to show cause is returnable forthwith before Judge Kingfield at Room 348 on this floor.

Mr. Querques: Mr. Hyland, before we leave, may I renew what I said initially and that is, would you explain how some of these [44] questions relate to the subject matter as set forth both in the resolution and in the subpoena? There are certain questions in here which make it obvious that the Commission is accusing or suggesting, at least, that Mr. Zicarelli is a member of Cosa Nostra and that he is familiar with its workings, if indeed there is such an organization. If that information is available to the Commission, I fail to see why the Commission shouldn't answer the question. If they have no basis for answering the questions because we already have the answers, I would think therefore the questions are not pertinent. In addition to that, I think that it becomes necessary to know the source of the information that gives rise or gives basis or foundation to the questions, because if

Excerpts of Transcript of Proceedings

these questions result or find their foundation from the existence of certain tapes which allegedly come from the premises of an office occupied by Mr. Samuel DeCavalcante, I think then there is another objection that can be raised, which I have not heretofore raised but which I suppose has been raised in general fashion. [45] Now, it may be that after Mr. Zicarelli has your explanation as to how these questions are pertinent and how the answers or what the connective reasoning is with respect to the questions that make them pertinent, he might want to review his position. I respectfully ask you, sir, to give us that explanation.

Chairman Hyland: Well, I respectfully suggest that the record is quite clear in showing the relationship of these questions to the inquiry into Monmouth County and Long Branch and I doubt very seriously, Mr. Querques, that this reflection you just referred to on the part of your client would result in any different responses on any given day. He has been asked very direct questions with regard to Long Branch and Monmouth County and refused to answer every one.

Mr. Querques: I frankly don't understand. Are you suggesting, Mr. Hyland, that no matter what, he will take the same position, that he is somewhat of an incorrigible witness?

Chairman Hyland: I am not taking that position. The record is there, Mr. Quer-

Excerpts of Transcript of Proceedings

ques [46]. and you make of it what you will. I will ask the Reporter, if he has not already done so, to mark a copy of the order to show cause which has been directed to Mr. Zicarelli as Exhibit C-3 for today.

(Exhibit C-3 was received in evidence.)

* * *

Order to Answer Question - Exhibit C-1

You are hereby ordered and directed by the State Commission of Investigation pursuant to the authority granted by Chapter 266, Laws of New Jersey, 1968, Section 17, and by Resolution of a majority of all the members of the Commission, to answer the question.

Upon compliance with this order, you shall be immune from having such responsive answer given by you, or evidence derived therefrom used to expose you to criminal prosecution or penalty or to a forfeiture of your estate, except that you may nevertheless be prosecuted for any perjury committed in such answer, or for contempt for failing to give responsive answer in accordance with the order of the Commission; and any such answer given shall be admissible against you upon any criminal investigation, proceeding or trial against you for such perjury, or upon any investigation, proceeding or trial against you for such contempt.

Verified Petition (Zicarelli)

(Filed 8/20/69)

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, MERCER COUNTY
DOCKET NO.**

In the Matter of :
JOSEPH ARTHUR ZICARELLI :
 charged with Civil Contempt of :
 the State Commission of In- :
 vestigation :

State of New Jersey: SS

County of Mercer :

WILLIAM F. HYLAND, of full age, having been duly sworn upon his oath, deposes and says:

1. I am the Chairman of the State Commission of Investigation (hereinafter "Commission"), State of New Jersey, with offices at 329 West State Street, Trenton, New Jersey, and am authorized to make this petition on behalf of the Commission.

2. Pursuant to the authority granted in Chapter 266, Laws of New Jersey 1968, as amended by Chapter 67, Laws of New Jersey 1969, N.J.S.A. 52:9M-1 to 18 (hereinafter N.J.S.A. 52:9M-1 to 18), Sections 2, 11 and 12, the Commission commenced an investigation into certain matters involving the City of Long Branch and the County of Monmouth, New Jersey, in April of 1969. Through its own investigative efforts, the Com-

Verified Petition (Zicarelli)

mission amassed considerable information about JOSEPH ARTHUR ZICARELLI.

3. On July 2, 1969, the Commission passed a resolution, a copy of which is annexed hereto and made a part hereof as "Exhibit A", authorizing the commencement of hearings on July 8, 1969, pursuant to N.J.S.A. 52:9M-2 and 12, into certain matters in Long Branch, and in Monmouth County, New Jersey.

4. In accordance with N.J.S.A. 52:9M-12(c), the Commission caused a subpoena, a copy of which is annexed hereto and made a part hereof as "Exhibit B", to be served upon JOSEPH ARTHUR ZICARELLI, requiring him to appear before the Commission on July 8, 1969, and on any adjourned date thereof to testify and give evidence as a witness at an Executive Hearing.

5. Pursuant to the command of "Exhibit B", JOSEPH ARTHUR ZICARELLI appeared before the Commission hearing on July 8, 1969. He was directed to return on July 10, 1969. He did so and was questioned by the Commission. I have been advised by ANDREW F. PHELAN, Executive Director of the Commission, that all questions propounded to JOSEPH ARTHUR ZICARELLI were derived from sources wholly independent of the Federal Bureau of Investigation logs of electronic surveillance filed with the Clerk of the United States District Court, Newark, in the case of United States v. DeCavalcante.

6. At the hearing of July 10, 1969, JOSEPH

Verified Petition (Zicarelli)

ARTHUR ZICARELLI invoked his privilege against self-incrimination and refused to answer any of the substantive questions posed to him by the Commission. The Commission excused him until subpoena.

7. I have been advised by KENNETH P. ZAUBER, Counsel for the Commission, that by letters dated August 15, 1969, and served by certified mail on that date, copies of which are annexed hereto and made a part hereof as "Exhibit C" and "Exhibit D", the Attorney General of the State of New Jersey and the Prosecutor of Hudson County, respectively, were advised of the Commission's intention to compel testimony from JOSEPH ARTHUR ZICARELLI by granting him immunity from prosecution and of the availability of the Commission to hear any objections to its proposed immunization of this witness. The Attorney General and the Prosecutor of Hudson County have interposed no objections to the proposed immunization of this witness.

8. On August 19, 1969, the Commission passed a Resolution, a copy of which is annexed hereto and made a part hereof as "Exhibit E" pursuant to N.J.S.A. 52:9M-17(a) authorizing the compulsion of testimony from and the grant of immunity from prosecution to JOSEPH ARTHUR ZICARELLI.

9. On August 20, 1969, the adjourned return date of "Exhibit B", JOSEPH ARTHUR ZICARELLI appeared before an Executive Hearing of the Commission and again refused to answer the questions posed by the Commission, having invoked

Verified Petition (Zicarelli)

his privilege against self-incrimination.

10. Pursuant to N.J.S.A. 52:9M-17 and "Exhibit E", the Commission ordered JOSEPH ARTHUR ZICARELLI to answer the questions propounded to him and conferred immunity upon him.

11. Although he had been ordered to answer the questions propounded and immunity had been conferred upon him, JOSEPH ARTHUR ZICARELLI still refused to answer the questions asked of him.

WHEREFORE, your petitioner prays that JOSEPH ARTHUR ZICARELLI be ordered to show cause why he should not be adjudged in contempt and committed to the Mercer County Jail until such time as he purges himself of contempt by testifying as ordered.

DATED: Trenton, New Jersey; August 20, 1969.

s/ William F. Hyland
WILLIAM F. NYLAND, Chairman
State Commission of Investigation
State of New Jersey

**Exhibit A - Resolution Annexed To Foregoing
Verified Petition**

RESOLUTION

RESOLVED, that the New Jersey State Commission of Investigation, commencing July 8, 1969, and thereafter until concluded, shall hold a private hearing in order to determine whether the laws of New Jersey are being faithfully executed and effectively enforced in the City of Long Branch, New Jersey, with particular reference to organized crime and racketeering; whether public officers and public employees in the City of Long Branch and in Monmouth County where it is located, have been properly discharging their duties with particular reference to law enforcement and relations to criminal elements; and whether and to what extent criminal elements have infiltrated the political, economic and business life of those areas; and be empowered to enlarge upon the scope of the hearing from time to time as circumstances may justify.

Further **RESOLVED** that COMMISSIONER WILLIAM F. HYLAND be designated to preside over such hearing and be empowered to designate any other member of the Commission to preside in his place over such hearing from time to time as circumstances may warrant.

Further **RESOLVED** that the Presiding Commissioner shall be empowered to adjourn the hearing from time to time to such other place or places as the circumstances may warrant.

*Exhibit A - Resolution Annexed To Foregoing
Verified Petition*

Further RESOLVED that the Presiding Commissioner shall be empowered to adjourn the hearing from time to time to such other place or places as the circumstances may warrant.

Further RESOLVED that COMMISSIONER GLEN B. MILLER, JR., be designated to participate with COMMISSIONER HYLAND in the conduct of the hearing, and that the Presiding Commissioner shall be empowered from time to time, as circumstances warrant, to designate one or more of the remaining Commissioners to participate in the conduct of the hearing.

Further RESOLVED that the Presiding Commissioner advise each witness and other persons participating in the hearing, of the limitations upon August 20, 1969, to appear and testify again under disclosure of information provided for in Section 15 of the New Jersey State Commission of Investigation Act.

Further RESOLVED that, in the discretion of the majority of the members of the Commission, manifested either orally or in writing, a public hearing may be convened at any time or times deemed appropriate with respect to the subject matters set forth above.

51a

*Exhibit A - Resolution Annexed To Foregoing
Verified Petition*

CERTIFICATION

The undersigned Executive Director of the New Jersey State Commission of Investigation does hereby certify that the above RESOLUTION was adopted at a duly constituted meeting of the Commission held on July 2, 1969, in fulfillment of the requirements of the Act establishing the Commission.

s/ Andrew F. Phelan
ANDREW F. PHELAN

**Exhibit B - Subpoena Annexed To Foregoing
Verified Petition**

STATE COMMISSION OF INVESTIGATION

STATE OF NEW JERSEY

TRENTON, NEW JERSEY

**IN THE NAME OF THE PEOPLE OF THE STATE
OF NEW JERSEY**

**TO: JOSEPH ZICARELLI, 551 Brandon Place
Cliffside Park, New Jersey**

You are hereby commanded to appear and attend before the STATE COMMISSION OF INVESTIGATION, STATE OF NEW JERSEY, at State Commission of Investigation, 329 West State Street, Trenton, New Jersey on the 8th day of July, 1969 at 10:00 o'clock in the forenoon, and on any adjourned date thereof, to testify and give evidence as a witness at an Executive Hearing to be held in connection with an investigation conducted pursuant to Section 12, Chapter 266 of the 1968 Laws of the State of New Jersey, N.J.S. 52:9M-12.

A GENERAL STATEMENT of the subject of investigation being:

Whether the laws of New Jersey are being faithfully executed and effectively enforced in the City of Long Branch, New Jersey, with particular reference to organized crime and racketeering; whether public officers and public employees in the City of Long Branch and in Monmouth County

*Exhibit B - Subpoena Annexed To Foregoing
Verified Petition*

where it is located, have been properly discharging their duties with particular reference to law enforcement and relations to criminal elements; and whether and to what extent criminal elements have infiltrated the political, economic and business life of those areas.

FAILURE TO ATTEND AND TO PRODUCE the items herein specified may subject you to contempt proceedings and to such other penalties as are prescribed by law.

WITNESS, Andrew F. Phelan, Executive Director for and on behalf of the STATE COMMISSION OF INVESTIGATION, STATE OF NEW JERSEY, this 12th day of June, 1969.

By (signed) Andrew F. Phelan Executive Director
Andrew F. Phelan

NOTICE TO WITNESS: In accordance with the provisions of Section 2, Chapter 376 of the 1968 laws of the State of New Jersey, N.J.S. 52:13E-2 of the Act establishing a code of fair procedure to govern state investigating agencies, you are herewith and hereby personally served with a copy of said act, a copy of the full text and provisions of which are set forth on the reverse side of this Subpoena.

**Exhibit C - Letter Dated August 15, 1969 to
Attorney General Sills Annexed to Foregoing
Verified Petition**

August 15, 1969

Honorable Arthur J. Sills
Attorney General
State House
Trenton, New Jersey

Attention: Edwin H. Steir, Co-Director
Peter Richards, Co-Director
Organized Crime Unit
c/o New Jersey State Police
Post Office Box 68
West Trenton, New Jersey

Re: Proposed Order to Compel the Testimony of
and Grand Immunity to JOSEPH ARTHUR
ZICARELLI, ANTHONY RUSSO and
ANGELO DeCARLO,

Sirs:

The State Commission of Investigation proposes to compel the testimony of Joseph Arthur Zicarelli, Anthony Russo and Angelo DeCarlo, witnesses before a Commission hearing and to compel them to produce evidence. Pursuant to Section 17 of the Act creating the State Commission of Investigation, Chapter 266, Laws of New Jersey, 1968, the Commission may order a recalcitrant witness to answer questions and produce evidence by conferring immunity upon him.

*Exhibit C - Letter Dated August 15, 1969 to
Attorney General Sills Annexed to Foregoing
Verified Petition*

The scope of investigation with respect to which the proposed immunity is directed concerns whether the laws of New Jersey are being faithfully executed and effectively enforced in the City of Long Branch, New Jersey, with particular reference to organized crime and racketeering; whether public officers and public employees in the City of Long Branch and in Monmouth County where it is located, have been properly discharging their duties with particular reference to law enforcement and relations to criminal elements; and whether and to what extent criminal elements have infiltrated the political, economic and business life of those areas.

Section 17 of the Act requires that the Attorney General and the appropriate county prosecutor shall be given at least twenty-four hours written notice of the Commission's intention to issue an order compelling testimony and conferring immunity, and be given an opportunity to be heard with respect to any objections they or either of them may have to the granting of immunity to any witness.

The purpose of this letter is to advise you of the Commission's intention to issue an order compelling testimony from Joseph Arthur Zicarelli, Anthony Russo and Angelo DeCarlo and conferring immunity upon them. In the event that you have any objection to the proposed orders of the Commission, please advise the Commission immediately. Should you wish to be heard on any objection

*Exhibit C - Letter Dated August 15, 1969 to
Attorney General Sills Answered to Foregoing
Verified Petition*

to the proposed grant of immunity, the Commission will be meeting at 10:00 A.M., Tuesday morning, August 19, 1969, at 329 West State Street, Trenton, New Jersey, to hear any objection.

Very truly yours,

STATE COMMISSION OF
INVESTIGATION

KENNETH P. ZAUBER
Counsel

**Exhibit D - Letter Dated 8/15/69 to Prosecutor
Quinn Annexed to Foregoing Verified Petition**

August 15, 1969

Honorable James F. Quinn
Prosecutor of Hudson County
Hudson County Courthouse
Jersey City, New Jersey 07306

Re: Proposed Order to Compel the Testimony
of and Grant Immunity to JOSEPH ARTHUR
ZICARELLI

Dear Mr. Quinn:

The State Commission of Investigation proposes to compel the testimony of JOSEPH ARTHUR ZICARELLI, witness before a Commission hearing and to compel him to produce evidence. Pursuant to Section 17 of the Act creating the State Commission of Investigation, Chapter 266, Laws of New Jersey, 1968, the Commission may order a recalcitrant witness to answer questions and produce evidence by conferring immunity upon him.

The scope of investigation with respect to which the proposed immunity is directed concerns whether the laws of New Jersey are being faithfully executed and effectively enforced in the City of Long Branch, New Jersey, with particular reference to organized crime and racketeering; whether public officers and public employees in the City of Long Branch and in Monmouth County where it is located, have been properly discharging their duties with particular reference to law enforcement and relations to criminal elements, and wheth-

*Exhibit D - Letter Dated 8/15/69 to Prosecutor
Quinn Annexed to Foregoing Verified Petition*

er and to what extent criminal elements have infiltrated the political, economic and business life of those areas.

Section 17 of the Act requires that the Attorney General and the appropriate county prosecutor shall be given at least twenty-four hours written notice of the Commission's intention to issue an order compelling testimony and conferring immunity, and be given an opportunity to be heard with respect to any objections they or either of them may have to the granting of immunity to any witness.

The purpose of the letter is to advise you of the Commission's intention to issue an order compelling testimony from Joseph Arthur Zicarelli and conferring immunity upon him. In the event that you have any objection to the proposed order of the Commission, please advise the Commission immediately. Should you wish to be heard on any objection to the proposed grant of immunity, the Commission will be meeting at 10:00 A.M. Tuesday morning, August 19, 1969, at 329 West State Street, Trenton, New Jersey, to hear any objection.

Very truly yours,

STATE COMMISSION OF
INVESTIGATION

KENNETH P. ZAUBER
Counsel

**Exhibit E - Resolution Annexed to Foregoing
Verified Petition**

**RESOLUTION OF THE
STATE COMMISSION OF INVESTIGATION
TO COMPEL TESTIMONY FROM AND CONFER
IMMUNITY UPON JOSEPH ARTHUR ZICARELLI**

WHEREAS, the State Commission of Investigation authorized an investigation into certain matters involving the City of Long Branch, and County of Monmouth, New Jersey, by resolution adopted July 2, 1969; and

WHEREAS, JOSEPH ARTHUR ZICARELLI was subpoenaed as a witness in the course of such investigation at a hearing held by the State Commission of Investigation on July 8, 1969, and was instructed to return on July 10, 1969; and,

WHEREAS, JOSEPH ARTHUR ZICARELLI refused to answer questions propounded to him at said hearing on July 10, 1969;

NOW, THEREFORE, BE IT RESOLVED by the State Commission of Investigation that JOSEPH ARTHUR ZICARELLI be ordered to answer all questions henceforth propounded to him by the State Commission of Investigation pursuant to Commission Resolution adopted on July 2, 1969, and that immunity be conferred upon him pursuant to Section 17 of the Act creating the State Commission of Investigation, Chapter 266, Laws of New Jersey, 1968.

*Exhibit E - Resolution Annexed to Foregoing
Verified Petition*

CERTIFICATION

The undersigned Executive Director of the New Jersey State Commission of Investigation does hereby certify that the above RESOLUTION was adopted by a majority of the Commission at a duly constituted meeting of the Commission held on August 19, 1969, in fulfillment of the requirements of the Act establishing the Commission.

/s/ Andrew F. Phelan
ANDREW F. PHELAN

Order to Show Cause

(Filed 8/20/69)

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, MERCER COUNTY
DOCKET NO.**

In the Matter of
JOSEPH ARTHUR ZICARELLI charged
with Civil Contempt of the
State Commission of Investigation.

This matter coming on to be heard through the verified petition of **WILLIAM F. HYLAND**, Chairman of the State Commission of Investigation, for an order adjudging **JOSEPH ARTHUR ZICARELLI** in contempt and committing him to the Mercer County jail until such time as he purges himself of contempt by testifying before the State Commission of Investigation as ordered, and the Court having considered the verified petition of the State Commission of Investigation and the exhibits annexed thereto.

It is, on this 20th day of August, 1969,

ORDERED that **JOSEPH ARTHUR ZICARELLI** show cause before this Court at the State House Annex, Room 348, Trenton, New Jersey, forthwith, why he should not be adjudged in contempt and committed to the Mercer County Jail until such time as he purges himself of contempt by testifying as ordered.

DATED: Trenton, New Jersey: August 20, 1969.

s/ **Frank J. Kingfield**

Excerpts of Transcript of Motion

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : MERCER COUNTY
DOCKET NOS. L-39097-68
L-41598-68 and L-41599-68**

**In the Matters of
ROBERT OCCHIPINTI, ANTHONY RUSSO and
JOSEPH ZICARELLI,
Charged with Civil Contempt of the State Com-
mission of Investigation.**

BEFORE:

**FRANK J. KINGFIELD, AJSC
Mercer County Courthouse
Trenton, New Jersey**

September 16, 1969

APPEARANCES:

**ANDREW F. PHELAN, Esq.,
KENNETH P. ZAUBER, Esq., and
WILBUR H. MATHESIOUS, Esq.,
Attorneys for State Commission of
Investigation.**

Excerpts of Transcript of Motion

SAMUEL D. BOZZA, Esq.,
 Attorney for Robert Occhipinti.
 WILLIAM POLLACK, ESQ.,
 Attorney for Anthony Russo.

MICHAEL A. QUERQUES, Esq.,
 Attorney for Joseph Zicarelli.

(JOSEPH BRILL, Esq., (New York Bar)
 of Counsel)

EXHIBITS

<u>NUMBER</u>	<u>DESCRIPTION</u>	<u>EVIDENCE</u>
WZ-1	Two Pages from Newark Sunday News, 7-27-69	54
WZ-2A	Three Pages of Newark Sunday News, 9-29-69	56
WZ-2B	Two Pages of Sunday Star Ledger, 1-12-69	56
WZ-2C	Pages 1 & 23 of Wall Street Journal, 2-20-69	58
WZ-2D	Pages 1 & 10 of Hudson Dispatch, 3-30-69	59
WZ-3A	Pages 1 & 10 of Evening News, 6-17-69	60
WZ-3B	Pages 1 & 13 of Evening News, 6-19-69	61
WZ-3C	Pages 1 & 14, Star Ledger, 7-10-69	61
WZ-3D	Newark Evening News dated 8-14-69	61
WZ-3E	Pages 1 & 15 of Star Ledger 8-21-69	61

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<u>NUMBER</u>	<u>DESCRIPTION</u>	<u>EVIDENCE</u>
WZ-4	Time Magazine dated 8-22-69	68
WZ-5A	Time Magazine, June 20, 1969	68
WZ-5B	Life Magazine, Sept. 1, 1967	68
WZ-5C	Life Magazine, Sept. 8, 1967	69
WZ-5D	Life Magazine, August 9, 1968	69
WZ-5E	Life Magazine, August 30, 1968	69
WZ-5F	Life Magazine, October 25, 1968	70
WZ-5G	Life Magazine, February 26, 1969	70
WZ-6	Hudson Dispatch Newspapers	71
WZ-7	Newark Evening Newspapers	72
WZ-8	Jersey Journal Newspapers	72
WZ-9	Star Ledger	73
WZ-10	N.Y. Daily News	73
WZ-11	N.Y. Post Newspapers	73
C-1	Stenographic Transcript of Mr. Zicarelli's testimony	77
C-2	Stenographic Transcript of Mr. Russo's testimony	77
C-3	Stenographic Transcript of Mr. Occhipinti's testimony	78
C-4	Letter dated 8-15-69, State Comm. of Investigation by K. P. Zaubers, to V. P. Kauper	80

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* * *

[Commencing at 10-8]:

The Court: All right, Mr. Querques, you may proceed.

Mr. Querques: I would like to call Mr. Phelan to the stand.

Mr. Mathesius: At this time, we would like to have an offer of proof from Mr. Querques as to how the testimony of Mr. Phelan relates to the issues before the Court.

The Court: Well, I think that is reasonable.

Mr. Querques: If your Honor please, I have already referred to the fact that we, in our brief, indicated we were going to have testimony. By a quick look at page 2, you will see we were going to offer testimony to establish the following:

1. Mr. Zicarelli has been the object of very extensive publicity referring to him not only as a racketeer and a member of the Cosa Nostra, but also as an "internationalist" in crime.

With respect to Number 1, I think Mr. Phelan can [11] testify to it.

We say in number 2 that, Mr. Zicarelli's activities, associations and reputation are well known to the Commission.

And we say in Number 4 that Mr. Zicarelli is by governmental pronouncement a main or prime target for prosecution.

We earlier in Number 3 said he has been a recipient of numerous subpoenas, surveil-

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lances and investigations over the past ten years by federal and state authorities.

We are satisfied that Mr. Phelan would have this information. And we quickly point out to your Honor that in the Commission's own petition for the Order to Show Cause which was delivered to your Honor, they indicate, "Through its own investigative efforts, the Commission amassed considerable information about Joseph Zicarelli." So, it is for those reasons we offer Mr. Phelan.

Mr. Mathesius: If I understand Mr. Querques correctly, he related to the first four points of his brief, on page 2, as the reason why he wants to have Mr. Phelan testify. Well, if your Honor please, with respect to those four points, we might possibly want to stipulate those in evidence. There is no necessity, and I don't think there is any particular disagreement as to the facts related [12] herein. We don't see how it relates in any event to the hearing and the questions of law facing your Honor, and we do think that primarily those four points are probably well taken.

Mr. Querques: I appreciate the stipulation, and I accept the stipulation, but I do point out to the Court as well as to the Commission that what I have put down in 1 through 4 on page 2 of the brief are just general conclusions, and in order to keep or perfect a good record, I do think that the general statements are not sufficient, but that they should be broadened out by specific information and specific detail. I don't think

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that any Court should rule on the basis of generalities such as are contained on page 2. It is for those reasons that I ask Mr. Phelan to take the chair so that I can prove the generalities through specific questions.

Mr. Mathesius: By the same reason, your Honor, there might be a number of specifics, and that is the particular offer of proof that we are requesting. We are wondering once again how that relates to the issues of law. We face a prior question as to how the questions that were asked of Mr. Zicarelli in the hearing are relevant, and I think we should get to that point first, the pertinency, and then approach these questions, and by that time, this information which Mr. Querques seeks, and which [13] seems to be somewhat of an expedition of sorts to get any or all information that might be relevant to the point in question. Once again, we are going far afield. We are not even starting out at the point where we are going to ask questions and get a lot of testimony that Mr. Querques wants. I think if your Honor looks at those points, generally or specifically they might well be stipulated and they might well be answered by the questions after the pertinency of these questions are developed.

Mr. Querques: Judge, the questions I intend to ask Mr. Phelan are not that large in number. I would estimate they are no more than 25 questions.

Mr. Mathesius: I think it is perfectly

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true, in any event, that his twenty-five questions relate to the four issues, and I think the issues are clear in themselves.

Mr. Querques: I might also add, sir, with respect to the pertinency, I don't know how a Court could intelligently rule unless the specifics that I seek to prove on the record come about by question and answer of Mr. Phelan.

The Court: Well, of course, the only problem we have is, if they stipulate the four points that you have raised in your brief, they are willing to admit all of this, that Mr. Zicarelli has been the object of publicity, and that his activities are known to the Commission, and, [14] of course, that he has been the subject of surveillances and investigations over ten years, and also a target for prosecution. They admit all that. I can't see that we are going to gain anything by the twenty-five questions that you propound. I mean we are probably going to arrive at the same result, aren't we?

Mr. Querques: No, sir. I don't think so, quite honestly, for this reason: let me say again that they have pointed out that they have amassed considerable information, and based upon at least some of the issues which we raise in our brief, I think it becomes incumbent upon your Honor to ultimately determine in this case whether or not due process, fundamental fairness is being applied to these witnesses, if you come to the conclusion, sir, respectfully, that this Commission has asked questions to which

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they already have the answers. Now, you know, sir, from looking at the transcript of the executive session of August 20, 1969, that they asked, as I counted them, and I think I counted them accurately, 100 questions right on the button. Now, if they had the answers to those 100 questions within the "considerable" information that they have amassed through their own so-called investigative efforts, I say to you that this raises a question of the bona fides of the good faith of their calling in this particular individual under these peculiar circumstances [15] and ask him to answer questions to which they already have the answers.

Now, while they may stipulate 1 through 4 on page 2 of my brief, that is not sufficient to demonstrate to you and for the record that they are acting in bad faith, because it doesn't show that they have the particular and specific knowledge that they sought to gain from Mr. Zicarelli.

Now, it may very well be that there is another way to skin the cat, and I would be willing to explore that with your Honor, and that is this, I think that in good conscience, the Commission should be obliged by your Honor to turn over to the Court that so-called mass of information that they have acquired as to Mr. Zicarelli, so that your Honor can determine whether or not they already have the answers. Now, it may be expected that I would ask for that information so that I could then say to your Honor, look at page 2 of this dossier, or on

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page 6 of this report of the F.B.I., they have the answer to question number 10 of Mr. Zicarelli on page 6 of the transcript. But I am not looking for a fishing expedition. I say categorically that I am satisfied to trust them in turning over to you whatever information they have, and I am also satisfied to trust your Honor to go over the information that they give you so that if you want to look to see whether or not [16] they have the answers to these 100 questions, you may do so. Although I do think at this posture of the case, I should be entitled to demonstrate and demonstrate forcibly that they have some, if not all, of the answers to what I consider the loaded questions.

I don't know if I am getting myself over to your Honor, but of the 100 questions, some of them are loaded. They are potent. They are so-called dynamite questions, in my mind, and those are the ones that I am concerned with. I am concerned with eliciting the specifics from Mr. Phelan or from any other member of the Commission, for that matter, so as to demonstrate again the bona fides and the good faith, because I fail to see, and they have failed to point out any case that would permit them to go on, not a fishing expedition, because it is not a fishing expedition if you have got the answers already. It is something worse than a fishing expedition. It is a sign of bad faith on their part to ask this man a question to which they already have the answer, if their object ultimately is to incarcerate him by way of.

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civil or criminal contempt. I don't see how, by our talking, we can really explore this area. This area requires us to take testimony, then, after the testimony, it requires, respectfully, your Honor to go into this information that they have, which they seek, of course, to keep private and [17] to keep secret. And I will go along with that. I have no objection to that, although I think, frankly, under these proceedings we really should see it, but at the moment, I don't say that, and I don't think I ever will say that because I know I can trust your Honor to read it, to peruse it and study it and come to the same conclusion that I have, and that is that they already have the answers.

Mr. Mathesius: Mr. Querques raises a very novel and interesting point, however, that point is completely without merit. That point is that the State Commission of Investigation does not conduct a bona fide investigation because it already knows the answers to some or all of its questions. If that be the indictment against the State Commission of Investigation, then that indictment must fall.

What law, what can Mr. Querques reach to say that only because the State Commission of Investigation already knows the answers to certain questions, that therefore it makes it a licentious and questionable investigation, and they already know the answers, Mr. Querques can say, "Well, Mr. Zicarelli, they already know the answers, so just repeat them." What difference does it make?

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That is not really the point. The point is that to take, for example, one of the questions, "Mr. Zicarelli, [18] are you a member of the Cosa Nostra?" Well, can Mr. Zicarelli answer yes or no to that? What about the evidence that we have with respect to whether he is or not? Who can tell us best? Can we determine that from hearsay or from the object of testimony or from the testimony of the individual himself? He is being protected absolutely by his answer. He was given testimonial immunity, and it cannot come back to him in any way, shape or form.

Now, if we take as a proposition that the Commission knows every one of the answers, I say to your Honor that has no relation. If the Commission seeks corroboration, that is legitimate and a worthwhile proposition for this Commission to make, corroborating information and to determine for itself exactly what the ramifications of organized crime, what we call the Cosa Nostra or the Mafia or any other political racketeering ramifications that might be developed from this.

The questions themselves, they speak for themselves. Now, the answers to those questions, I say the point is missed entirely whether we know the answer by inference or innuendo from other sources of information is immaterial. For that reason, I say we should not have a hearing at this point. Take the proposition that we do know all the answers, it doesn't affect the bona fides of the investigation one iota.

[19] The Court: The problem we have,

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I think, Mr. Querques is challenging the bona fides of the investigation. I am somewhat inclined to agree — of course, I don't know what questions he intends to ask. I was thinking that possibly we ought to find out just what they are. I am inclined to feel, too, that I don't think that the Commission should be forced to reveal its source of information either.

Mr. Querques: Your Honor perhaps misunderstood me. I do not intend by my questions to ask anyone the source of the information. My only purpose in asking the questions is to determine whether or not they do have the information. Whether it came from a tape, whether it came from an informer, whether it came from the F.B.I., I care not. What I care about is, do they have the information?

Now, I take Mr. Mathesius' statements to indicate — I trust I am correct. If not, correct me. I gather from what he says that they acknowledge that they do have the answers to these approximately 100 questions that were asked on August 20, 1969.

Mr. Mathesius: No, not all of them, your Honor. Maybe I can clear it up. I am saying, taking it as a fundamental proposition that we do have the answers, if we do, it is absolutely immaterial. If Mr. Querques' point is to put Mr. Phelan on the stand and by Mr. Phelan's [20] testimony say they already have the information, that is irrelevant and immaterial, your Honor.

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It means nothing with respect to the pertinency and to the legitimate objectives of this investigation. I was stating that as a hypothetical, if we in fact did, which I am not admitting.

The Court: Well, let's get the questions? Certainly, since you are going to ask them, there is no reason why they shouldn't be — Of course, I realize that possibly one question might lead to another, but if I had some idea just what you want.

Mr. Querques: I can do that for your Honor. I would like to ask Mr. Phelan, for example, whether or not he has information that Mr. Zicarelli is a member of a so-called Cosa Nostra family that carries the label the Bonanno family.

The Court: Let's stop there. Of course, we have the press. We have magazines. I don't know whether they have any conclusive proof — That is, when I talk about proof, that which could be used in a court of law or whether it would be proof in the nature of hearsay that people have written about people. After all, all of these men have, I suppose, a reputation through the press, and every time they appear in court or every time they do something, even if they were, I suppose, to do nothing more than go through a red light, there would probably be some reference to [21] their past. I don't know. I have seen it in certain instances. I haven't seen it particularly with any of these people, but I know that it has happened to people in this area, people

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who have, let me say, somewhat similar reputations in the community, that every time they do something, the press blows it up to all proportions. And, of course, there is nothing we can do to stop it, I suppose.

Mr. Querques: Your Honor is exactly right about what you have said. But your Honor has omitted this. I am not concerned about what Mr. Zicarelli's reputation is, as created by the press. What I am concerned about is the information that the Commission has which does not come from the press, but rather comes from official sources, and I will be specific. This Commission, for all practical purposes, is a branch of the Attorney General's office. If we cannot accept that proposition, it is, at least, an agency of the State Government of New Jersey, and therefore can call upon the Attorney General's office for its information. So that I think we can establish that they have information from an official source, to wit, the Attorney General. They have information from their own sources, to wit, their own investigators. They have information coming to them from the F.B.I., another official source. This can go on and on. I am not trying to create a situation here where I say they have facts which they [22] got out of a newspaper, although that is also true. They also have facts which they got out of magazines. But it is the official source of information coming in to them by which they have knowledge of the man's background, the man's activities, the man's friends and

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associates, and the man's alleged illegal actions, and it is this situation which creates the lack of bona fides on their part. This situation creates the bad faith in calling him in in an investigation of this kind.

Now, I must confess that it is a little difficult to talk about these things because we are no talking about specifics. The brief is broken down into six points. Some of the points have sub-points. And, frankly, the whole thing is not going to make sense either before this Court or before any other Court that may take an Appellate view of the matter unless there is a clear record. Our conversing back and forth with your Honor and between ourselves about these issues is not going to help anyone who has the obligation, such as your Honor, to make a decision, nor is it going to help anyone who might have to review your Honor's decision. I think we have to get to the hard core facts of the situation, otherwise we are going to be frustrated in proving what we say we should be able to prove in order that the legal consequences which we suggest in the brief will flow. For me to get up [23] and just spout off about these things is meaningless. If I can put them on the record and establish them —

The Court: Well, go ahead with your questions anyway. You have given one. Give us another.

Mr. Querques: I wanted to ask Mr. Phelan if he had information that the Cosa Nostra or the Mafia is a term used by law

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enforcement people such as themselves to indicate a family whose purpose is dedicated to crime, and whose purpose is dedicated to the protection of those members of the family engaged in that activity? I wanted to ask him if he had information that for one to become a Cosa Nostra member, so-called, he must be initiated into a particular family. I wanted to ask him if it isn't a fact or if he doesn't have information to the effect that in order to be initiated or as part of the initiation process you must take an oath. Then I wanted to ask him about the nature of the oath. Isn't it true that the nature of the oath is one of silence? That is to say, if you speak about the activities of the family or your own activities, the family must commit or sentence you to death by way of murder? I wanted to ask him if he didn't have information with respect to at least one so-called underworld informer who alleges that he was a member of this Cosa Nostra, and that is this fellow Joseph Valachi who testified in 1963 in Washington before the McClellan [24] Committee; if it wasn't true that in that situation the so-called family of which he was a member put a price on his head of \$100,000.00 to have him killed because he violated that oath? I wanted to ask him if it isn't true that the government, when they get informers who inform against the underworld, and especially organized crime, the government will provide a new job for the man, they will relocate him, they will change his family and iden-

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tity, and, if necessary, even give him money to get started? I wanted to ask him if he doesn't have knowledge that Mr. Zicarelli has been precisely and specifically labeled by the United States Government, to wit, the defendant of justice, as one of eight main targets for prosecution by the Federal Government. This was done in January of 1969. The information was given by the Department of Justice to all kind of newspapers and news media, and they know it. I wanted to ask him if it wasn't true that he had information that this "internationalist" that was given to Mr. Zicarelli was given to him because of alleged activities with the Dominican Republic, Venezuela and Canada and other places.

Now, I may digress here for a moment. The answer to that question is very crucial in that this area, because one of the points that we raise is that a man in the United States, irrespective of an offer of [25] immunity, has a right to invoke the Fifth Amendment if he has a real and appreciable danger of prosecution in, first of all, a foreign country, and, secondly, in a sister state. Now, for me to say it is one thing, for them to acknowledge they have this information and then have me argue from the admission is completely another matter.

I do think it is an extremely substantial point. As a matter of fact, let me say now that the brief omits to give you the benefit of the Murphy vs. Waterfront Commission and the dissertation by Mr. Justice Goldberg in

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the case of United States of America against McCrae, which I will argue, although it isn't in the brief.

I want to ask Mr. Phelan if he has information that Mr. Zicarelli is sought in the State of New York by three different counties, specifically Kings County in connection with the Grand Jury investigation concerning again this so-called Bonanno family and warring factions; Queens County with respect to the murder of one by the name of Joseph Giuliano; and also in Bronx County with respect to certain numbers operations and bribery of public officials in Bronx County on which the allegation is based that this activity has its genesis in the State of New Jersey, and Mr. Zicarelli has something to do with it. Here again the admission would assist us in arguing forcefully that the immunity sought to be conferred in New [26] Jersey is meaningless because it does not protect from prosecution in New York.

I also wanted to ask him if he didn't have knowledge that Mr. Zicarelli has received many subpoenas and subjected to investigation by State and Federal men as well as surveillances by both State and Federal men over at least the past 5 to 6 years. I wanted to ask him if it is true that some or all of this information some or all of it comes from either wiretapping, bugging, eavesdropping or other electronic apparatus.

I wanted to ask him whether of the 100 questions of Mr. Zicarelli, if they could

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answer all of the questions with the information already available. . I wanted to ask him if it wasn't true that the Attorney General, former Attorney General, Robert Kennedy, and a member of this Commission, Charles L. Bertini, Esq., haven't both taken the position publicly and to the press that Cosa Nostra is to them a private government dedicated to living off people in some parasitic nature.

I wanted to ask him if it wasn't a fact that in this case presently before you, the petition and the Order to Show Cause were prepared the day before the hearing to show that they knew as of the 19th that Mr. Zicarelli was going to invoke the Fifth Amendment, in order to demonstrate the good faith or bad faith on their part, because I [27] think it is important that if on the 19th they prepared this petition and had Commissioner Hyland sign it either on the 19th or on the following morning of the 20th, and if I took place even before Mr. Zicarelli and I went in before the Commission, and if it was signed before the questions were even put to us, it indicates very clearly to me, at least, that in their minds they knew exactly what Mr. Zicarelli was going to do. If they know it, how did they know it? They know it from everything that I have been saying without repeating it. And because they knew it, it raises the question that I raise in the brief, what are they really trying to do here? Are they really, genuinely, sincerely, and earnestly attempting to get facts so that they can

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recommend legislation?

I want to ultimately recommend to your Honor that is nothing but hogwash because, first of all, the statute doesn't say that. The statute says that they are relegated to making recommendations or giving facts to the Governor who in turn makes recommendations to the Legislature. I think that this question bears on the other issues. It bears on the issue of separation of powers.

So, I think without going any further, and without, you know, sort of — I get the impression that your Honor is getting tired of hearing me, and I don't want to tire you out, but I do want to, as a lawyer, professionally [28] explain for the record the necessity of getting this information so that the arguments ultimately made with respect to the law are properly focused.

The Court: Well, Mr. Mathesius?

Mr. Mathesius: I will just make a very short statement.

Mr. Querques has raised six points in his brief, and the recitation that he just made relates to none of those legal issues. He has formally stated that he wants Mr. Phelan to get on the stand and he would not ask the source, whether that source be the Life Magazine or whether it be bugging, wiretapping, official sources. He would not ask the source, but he would ask, did he have information? How, what possible point, what point would an answer of yes or no get? I see nothing.

He further related that his questioning was to show the bona fides of the investigation.

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And I say to your Honor that the second and third points were perceived from Mr. Querques' recitation, not for the bona fides but more to show questions of incrimination, whether he is being prosecuted elsewhere. All of this is meaningless to the point at hand. To those six issues that Mr. Querques raised, those questions don't mean a thing.

Your Honor, quite respectfully —

Mr. Querques: May I get us back in perspective, [29] Judge? All the answers or most of the answers to the questions that I have indicated to your Honor I would like to get answers to, in my humble judgment are incorporated in essence, in spirit and in actuality in Point 4 of the brief, which point says that even if we come to the conclusion that the statute is constitutional, you may nonetheless come to the conclusion that the implementation or the use of the statute by the Commission is unconstitutional. To phrase it another way, while they may have the right to investigate, they do not have a right to abuse the investigative process. Having the right to investigate doesn't give you the right to abuse that process. And I am not just talking off the top of my head, because in the brief, we cite to you the case of Watkins, Sweezy and Scull which stand for that proposition.

Mr. Bozza: Might I just add, if your Honor please, that I think this Court is saddled with the responsibility of evaluating and considering the setting and the circum-

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stances under which these questions have been propounded, because that has been held to be criteria, to take it into consideration when evaluating and disposing of these complexed issues that are before you in this hearing. So that any testimony that would give your Honor the benefit of the circumstances and the setting under which these questions were propounded is very, very important.

[30] Mr. Querques: May I say, sir, I trust that you understand and appreciate the sincerity with which we make these arguments, not only from the legal standpoint but also from a practical standpoint. I think that it should be obvious to you that we are not looking to go through what they have. Bear in mind that I said I would be satisfied for your Honor to look through that information, and bear in mind also that we have asked that the public be excluded here. We are not looking for glory. We are not looking to impede anybody. We are not looking to step on anybody's toes. But we do insist and we do hope that everything that may shed light on the issues raised will be considered by your Honor, because I think you would agree with me, with all your years of experience, that it is unfair to a litigant to have an issue decided on half-facts or three-quarter facts or omitted facts. We are just trying to bring everything that we can think of which is relevant here before you, and if you want to take some of it in camera, it is perfectly all right with us.

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Mr. Mahhesius: One final question. Relevancy is the point to this motion of Mr. Querques to have testimony taken. Your Honor, the State Commission of Investigation has information from multifarious sources. It has information from Life Magazine, the papers, the investigators, some official sources. What we haven't had, [31] if your Honor please, we haven't had information from the witnesses. That is all we ask your Honor, to get the information from the horse's mouth.

Mr. Querques: That is the essence of this whole proceeding. That is the essence of it. And that is if you have the information, can you go to the horse's mouth and attempt to extract that information from the so-called horse's mouth, if by so doing you accomplish two things. You accomplish, first of all, a dissolution or a dissolving or a destruction of his constitutional rights. And, on the other hand, unrelated to the law, but really the body of the law, you destroy the human being. And that is what we are talking about.

So, when they say want to go to the horse's mouth, it is just nothing but a lot of lip service talking out of two sides of your mouth. If I know an answer, I don't go bother somebody to get the answer all over again. If I know an answer, I don't get an answer from somebody and want to rip up the Constitution in his face. If I have got an answer, I don't want to go to the man and say you give me the answer because you

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are the horse's mouth, and in the process of getting the answer, Mister, I am going to see to it one of two things happen, you will either get killed by your own or I will put you in jail with the help [32] of the Judge who is nothing but a donkey sitting up there because I run it. I run it. When I ask you a question and you refuse to answer, that Judge has no discretion the way they see it. They bring the man in front of the Judge and they say, "We asked him six questions. He refused to answer. We gave him the immunity, and now sack him away." That is the whole thing we are here to decide. That is the whole thing.

Mr. Mathesius: Your Honor, despite the emotional effluvium we just experienced in this court, the fact that Mr. Zicarelli — And I say at this point, your Honor, that Mr. Querques has again jumped a little ahead and said we do have the information. I do not acknowledge that as a fact. I am saying hypothetically again and I will say it again to Mr. Querques hypothetically, if we had it, it wouldn't make any difference. But we are entitled to get the information from Mr. Zicarelli, and that is the whole point:

Mr. Querques: Very quickly, your Honor. I have heard in one instance where they say we will concede we have the information, then they say on the other hand we don't acknowledge that we have the information. And I respectfully submit for the last time that that particular matter may be resolved

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as to whether they have it or not by your Honor seeing their file to peruse in camera.

[33] Mr. Mathesius: May I make a final point about concession. We at no time ever conceded that we have the information. If there is any question about that, I would like that resolved. I once again want to restate that hypothetically if we should have it, it doesn't make any difference. And I think Mr. Querques has already agreed that the source doesn't make any difference. He is not going to question the sources, whether it is Life Magazine or what. The point is, we are entitled to get that information from Mr. Zicarelli.

* * *

[Commencing at 37-2]:

The Court: Well, of course, the only problem I have is this, the questions that you wish to propound of the Commission in a sense, I suppose, puts the Commission on trial primarily as to its good faith, and I will admit that in the course of reading the extensive briefs and documents in this case, there are a great many unsolved problems that I haven't resolved in my mind either. But I don't think that putting Mr. Phelan on the stand will help me better to decide the case. I think I have to accept that from what has been said today that the Commission acknowledges that it has some information. Now, whether it has all the information or

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not, I question, from the remarks that were made by Mr. Mathesius, that they probably have some information. And I appreciate the dilemma that it creates for the witnesses, but we do have, I suppose — And I am assuming that the answers to those questions will probably lead us again to the four points that you have set forth, that they have some information. Now anybody can prove that a particular person is a member of an organization such as the Cosa Nostra or the Mafia, and prove it beyond a reasonable doubt, I don't know, unless somebody in the organization has seen fit to be an informer, and has mentioned names. And I have read the paper. This is my first bout with criminal laws in twelve years. I don't [38] follow it too much. I honestly don't think that I need the answers to those questions to decide the overlying issues, the problem of the constitutionality of the Commission, even, let's say, the good faith of the Commission. I have to accept for the time being that the Commission is seeking information for legitimate purposes. I think there are enough constitutional issues raised in this case to concern me without going into this collateral trial of putting the Commission on trial, and that is what that amounts to.

Mr. Querques: Well, it may appear this way, sir, on the surface that we are attempting to put them on trial, but it really isn't that at all. What we are trying to expose here is that the processes that they used are

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abusive of the Constitution in that they go too far afield with respect to a person of the type and nature of Mr. Zicarelli. Now, I think that if your Honor says you have to accept their good faith, it throws me for a loss, because I think that when we make the allegation that they are dealing in bad faith, because they have the answers and so forth and so on, I think that we are entitled to at least have the opportunity to attempt to demonstrate that rather than to be confronted with a situation where their good faith, ipso facto, is accepted. So, it is for that reason that in the final analysis I said to you, would you at least take the information that they have and peruse it on your own in [39] camera, because if you do it that way, at least we get something, whereas this other way, if you don't take it, we get absolutely nothing.

* * *

[Commencing at 49-8]:

The Court: . . . Well, frankly, I have to accept the good faith of the Commission. We do have a law that was passed creating the Commission. I certainly think that one of the objectives certainly of good government, I suppose, is to ascertain whether such a thing as organized crime exists or even flourishes within a state, and to take measures to counteract it. Now, whether the source of information that the Commission

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has, that it has all of the answers or part of the answers, I don't think is material. I am somewhat inclined to feel that the Commission still have the right to seek information from whatever source it can derive information.

Now, I will admit that one point that probably does trouble me, and that is the issue of whether the sole information that it has concerning these witnesses might have been obtained by the Commission through sources that might be deemed improper. That has given me some concern. But even assuming for a moment that [50] the only source it has is from illegal wiretaps, I am still not convinced that the Commission should be precluded from its investigation to discover the situation of conditions that might exist in this State. Now, whether it does or not, I don't know. I don't know whether the Commission knows. But certainly it has the right to find out whether it does. And I suppose that when I reach that conclusion, that then we have the question of whether or not these questions either are relevant or are material to that matter. But my ruling at the present time is such that I am not going to have Mr. Phelan take the stand and answer the questions about to be propounded of him by Mr. Querques.

Mr. Querques: If your Honor please, with respect to this ruling, and just so that the record is perfectly clear, may I indicate by way of an offer of proof that with respect to those questions that I indicate I would ask

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Mr. Phelan, I now indicate for the record that I would expect that he would have given me affirmative answers, that his "yes" answers to all of the questions that I would have asked him about whether or not he had information about the various subject matters that I include in the questions.

The Court: Well, you made your point. I don't know whether he would have given you affirmative answers [51] or not. The only point I feel what was said quite a while ago when we started, that it is apparent that the Commission has sufficient answers to warrant a conclusion as you have set forth in your four points on page 2 of your brief, that certainly the answers would reach that conclusion. I suppose to that extent it probably means that the answers to the questions would be affirmative.

* * *

[Commencing at 55-5]:

The Court: What is the purpose of putting these articles in?

Mr. Querques: Yes, your Honor, I have several purposes. The newspapers and magazines will demonstrate firstly that Mr. Zicarelli is a target for prosecution in New York, in New Jersey, at the Federal level, and even in foreign countries, and I propose to show that by these — I have broken them down into categories — by the next four newspapers that I am going to give you, if we can have

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them marked with WZ-2A, B, C and D, that is the purpose of demonstrating the scope of his sphere of involvement.

Mr. Mathesius: Again these matters have all been stipulated to, and notwithstanding the hearsay problem that the articles bring into the picture, as Mr. Phelan said, we have already stipulated these facts. If Mr. Querques desires them put in the record, we have no objection.

The Court: All right, let them be marked.

Mr. Querques: For the record, the Sunday News dated September 29th, 1969, from the New Jersey section [56] in which the heading is, "The Mafia Spreads Out," pages 1, 12 and 13, Mr. Zicarelli being mentioned specifically on page 13, to be marked as WZ-2A.

(Three pages of the Newark Sunday News dated September 29, 1969 above referred to by Mr. Querques were received in evidence and marked Exhibit WZ-2A.)

Mr. Querques: As WZ-2B, the Sunday Star Ledger of January 12, 1969, pages 1 and 24, wherein the lead line reads "U.S. Names Targets in Mafia Probe." The lead line is repeated on page 24. And on page 24 appears a picture of Mr. Zicarelli with several other individuals.

(Two pages of the Sunday Star Ledger dated January 12, 1969 above referred to by Mr. Querques were received in evidence and marked Exhibit WZ-2B).

Mr. Mathesius: If your Honor please, at this time, I would like to move that this be entered into evidence in bulk, if he is going

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through the various issues. There are broad questions of hearsay and what have you. I wonder if your Honor would consider papers as evidence of the statement Mr. Querques made which has already been stipulated to, so we might not waste any more time.

Mr. Querques: It is not a waste of time. The record wouldn't be clear as to what the papers are. Supposing they were lost? If you want to refer to [57] something, you can't refer to something in bulk.

Mr. Mathesius: It appears that Mr. Querques has well over fifty issues.

Mr. Querques: I am sorry. Maybe I misunderstood. There are three categories which I want to spell out, the rest I want to offer in bulk.

Mr. Mathesius: I would still make the same request, Your Honor, that the entire matters be introduced in bulk. I don't see how they are relevant, but we have condescended to allowing them to be admitted in evidence over objection. But it is apparent it will get out of hand.

The Court: Well, I don't think it will get out of hand. It is stipulated in evidence. I will let Mr. Querques proceed. He is trying his case. Let him try it.

Mr. Mathesius: Your Honor, at this point, may I request that this proceeding be moved from an in camera proceeding to an open door proceeding? I think we are by the portions of the testimonial offerings.

Mr. Querques: No, sir, that isn't so. We haven't even come to the pertinency of

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the questions, which is the main part of the reason for this being held in private, because the questions have never been aired in public.

Mr. Mathesius: It was my understanding that these questions were submitted as a part of our brief and [58] to the Court, and Mr. Querques, you have a copy, do you not?

Mr. Querques: A copy of the transcript, but nobody has ever argued the pertinency of them yet. Nobody has reflected on them yet. We all know what they are, but there has been no discussion of them.

Mr. Phelan: Your Honor, may we then argue the question of pertinency of the questions before we get to all the other issues that are before the Court? It was my understanding that the Court was clear that that would be the first issue that was to be considered.

The Court: Well, I feel that in view of the ruling that I previously made precluding Mr. Querques or his associates from inquiring of you, Mr. Phelan, that he is now seeking to, I suppose, put something on the record to indicate that you are aware of this situation, for what it is worth.

Mr. Phelan: I see.

The Court: I think he is entitled to put that on the record.

Mr. Querques: As WZ-2C, the Wall Street Journal dated Thursday, February 20, 1969, pages 1 and 23.

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(Pages 1 and 23 of the Wall Street Journal dated February 20, 1969, above referred to by Mr. [59] Querques, were received in evidence and marked Exhibit WZ-2C.)

Mr. Querques: As WZ-2D, the Hudson Dispatch of Saturday, August 30, 1969, pages 1 and 10.

(Pages 1 and 10 of the Hudson Dispatch dated August 30, 1969 above referred to by Mr. Querques were received in evidence and marked Exhibit WZ-2d.)

The Court: Before you go on to the next batch, what are you attempting to show by WZ-2?

Mr. Querques: WZ-2 -

The Court: In capsule form.

Mr. Querques: It reflects on the fact that Mr. Zicarelli is a target of prosecution in New York, New Jersey, Federal jurisdictions and foreign countries.

The Court: All right.

Mr. Querques: Now, with respect to the second batch, they will reflect upon statements made by Mr. Phelan and by the Government to the press with respect to the desires of the State to jail the witnesses that were subpoenaed in connection with this particular hearing, of which Mr. Zicarelli is only one, sir.

The Court: I just didn't get the import of that. Will you repeat that, Don?

(Reporter read the record as requested.)

Mr. Mathesius: That is a little broad to digest [60] and swallow in a capsulated ver-

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sion. May we have these introduced without any capsulation? They are already hearsay, and if they stand in support of the points Mr. Querques makes on page 2, we have already stipulated them. Again, your Honor can take judicial notice of them, but to have Mr. Querques make statements that they are evidence of the fact that Mr. Phelan and the Governor were desirous to jail Mr. Zicarelli —

The Court: The only reason I am asking Mr. Querques to capsulize it is to save me the time of reading them in detail.

Mr. Querques: That is why I have broken them down, sir. If you do want to read a particular item, you will know exactly where to go.

The Court: After all, I am aware they are newspaper articles. Just what import they are going to have, I don't know.

Go ahead.

Mr. Querques: As WZ-3A, the Evening News of Tuesday, June 17, 1969, referring to pages 1 and 10.

(Pages 1 and 10 of the Evening News dated June 17, 1969, above referred to by Mr. Querques was received in evidence and marked Exhibit WZ-3A.)

Mr. Querques: As WZ-3B, sir, the Evening News dated Wednesday, June 19, 1969, wherein I specifically [61] call to your attention the headline, "Immunity to be Lever" on page 1 carried over to page 13.

(Pages 1 and 13 of the Evening News

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dated June 19, 1969, above referred to by Mr. Querques were received in evidence and marked Exhibit WZ-3B.)

Mr. Querques: As WZ-3C, the Star Ledger of Thursday, July 10, 1969, wherein the heading on page 1 reads, "DeCavalcante Grilled Ordered Back for More," and also on page 14.

(Pages 1 and 14 of the Star Ledger dated July 10, 1969 above referred to by Mr. Querques were received in evidence and marked Exhibit WZ-3C.)

Mr. Querques: As WZ-3D, the Evening News of Thursday, August 14, 1969, wherein the headline is, "Bertini Asks Bar to Form Crime Units."

(Newark Evening News dated August 14, 1969 above referred to by Mr. Querques was received in evidence and marked Exhibit WZ-3D.)

Mr. Querques: As WZ-3E, the Star Ledger dated Thursday, August 21, 1969, wherein the headline reads, "SCI Chairman Confident of Jail Terms for Silent 3," and going over to page 15.

(Pages 1 and 15 of the Star Ledger dated August 21, 1969 above referred to by Mr. Querques, were received in evidence and marked Exhibit WZ-3E.)

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[Commencing at 67-22]:

Mr. Querques: May I offer, sir, as WZ-4, Time Magazine of August 22, 1969. That bears the heading on the cover, "Mafia versus America," and the article contained in the magazine beginning at page 17 and running over to page 27. I offer this article to demonstrate the [68] definition of the so-called Cosa Nostra, the necessity to be initiated into it, and what the initiation process consists of, and what the code of silence consists of, and what the consequences of violating that code are.

The Court: It may be marked WZ-4. (Time Magazine dated August 22, 1969, above referred to by Mr. Querques, was received in evidence and marked Exhibit WZ-4.)

Mr. Querques: I have, sir, seven magazines. May I offer these as one exhibit, again making them A, B, C, et cetera. As WZ-5A, Time Magazine dated June 20, 1969, the article which appears beginning at page 22.

(Time Magazine dated June 20, 1969 above referred to by Mr. Querques was received in evidence and marked Exhibit WZ-5A.)

Mr. Querques: Then I have six Life Magazines. May I have the one dated September 1, 1967, marked as WZ-5B, and includes therein the article beginning on page 15.

(Life Magazine dated September 1, 1967

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above referred to by Mr. Querques, was received in evidence and marked Exhibit WZ-5B.)

Mr. Querques: May I offer as WZ-5C, Life Magazine article dated September 8, 1967. I call to your attention the article entitled "The Mob" beginning at [69] page 91. I specifically point out in that article references to Mr. Zicarelli appearing on page 100 and 101.

(Life Magazine dated September 8, 1967 above referred to by Mr. Querques, was received in evidence and marked Exhibit WZ-5C.)

Mr. Querques: May I have Life Magazine dated August 9, 1968, marked as Exhibit WZ-5D with respect to the article entitled, "The Congressman and Hoodlum," beginning at page 20. And I point out to your Honor the picture of Mr. Zicarelli appearing on page 21, and the entire article including his name in various spots.

Mr. Phelan: What was the date of that?

Mr. Querques: August 9, 1968.

(Life Magazine dated August 9, 1968 above referred to by Mr. Querques was received in evidence and marked Exhibit WZ-5D.)

Mr. Querques: May I offer, sir, as WZ-5E Life Magazine article dated August 30, 1968, beginning on page 30, the title being "The Mob."

Mr. Phelan: Might I ask Mr. Querques what relevancy that has to Mr. Zicarelli?

Mr. Querques: His name is not mentioned in that, but it does refer to the subject

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matter of the Cosa Nostra.

(Life Magazine dated August 30, 1969 above referred to by Mr. Querques was received in evidence and [70] marked Exhibit WZ-5E.)

Mr. Querques: May I offer Life Magazine dated October 25, 1968 as WZ-5F, specifically the article beginning on page 70 entitled, "The Mob: Gallagher Continued: The Congressman and the Salad Oil Swindler."

(Life Magazine dated October 25, 1968 above referred to by Mr. Querques was received in evidence and marked Exhibit WZ-5F.)

Mr. Querques: May I have marked as WZ-5G Life Magazine article dated February 28, 1969, the article appearing beginning on page 21 entitled "Power Struggle After Death in Family."

(Life Magazine dated February 28, 1969 above referred to by Mr. Querques was received in evidence and marked Exhibit WZ-5G.)

Mr. Querques: May I offer, sir, as WZ-6 various editions of newspapers known as the Hudson Dispatch, and specifically offering them all as one exhibit rather than give them each a separate letter? Those issues of September 7, 1968, September 19, 1968, September 20, 1968, December 28, 1968, December 30, 1968, December 31, 1968, January 3, 1969, January 13, 1969, February 12, 1969, February 13, 1969, July 10, 1969, July 11, 1969, July 16, 1969, July 23, 1969, July 25, 1969, July 30, 1969, August 20,

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1969, August 21, 1969, August 22, 1969, September 6, 1969.

[71] Mr. Phelan: Your Honor, with regard to that last offer, I would like to say that I have a copy — I am not terribly familiar with the Hudson Dispatch. I have a copy of it in front of me dated August 25, 1969, in which a statement is purported to be made by myself which I feel is clearly erroneous as to any position I ever stated concerning the petitions before the Court or the Commission's petitions before the Court. I don't know with regard to the other articles which have been just presented. I will not seek to examine them at this time, but if those are as accurately reported as the one I have in my hand, I have some doubts as to the accuracy of them.

(Hudson Dispatch newspapers above referred to by Mr. Querques were received in evidence and marked Exhibit WZ-6.)

Mr. Querques: May I offer in bulk, sir, as WZ-7, the Newark Evening newspaper, and as part of that exhibit in bulk those articles appearing on the following dates, December 26, 1968, January 22, 1969, June 10, 1969, June 11, 1969, June 12, 1969, June 15, 1969, June 19, 1969, June 24, 1969, July 6, 1969, July 8, 1969, July 9, 1969. There are several pages in July 9, your Honor, which are not joined together. Another one dated July 9, a different issue of the same newspaper, being the Sports Final. July [72] 10, 1969, July 11, 1969, July 14, 1969.

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July 15, 1969, again July 15, 1969, the Sports Final Edition, July 16, 1969, July 22, 69, July 23, July 29, July 30, July 31, August 2, August 20, August 20 again, the Sports Final, and August 21, 1969. V

(Jersey Journal newspapers above referred to by Mr. Querques were received in evidence and marked Exhibit WZ-8.)

Mr. Querques: I now offer, your Honor, as WZ-9, a newspaper known as the Star Ledger, published in Newark, New Jersey. Again offered in bulk those issues beginning with August 12, 1969, and including July 30, 1969, July 23, 1969, July 8, 1969 — I am sorry, sir, some of these are out of order. The dates will not be in order. December 27, '68, December 30, '68, November 29, '68, August 21, '69, August 7, '69, August 8, '69, August 2, '69, August 20, '69, July 30, '69, July 23, '69, July 21, '69, July 17, '69, July 16, '69, July 15, '69, July 14, '69, July 13, '69, [73] July 11, '69, July 10, '69, July 9, June 11, December 31, '68, January 12, '69, September 20, '68.

(Star Ledger newspapers above referred to by Mr. Querques were received in evidence and marked Exhibit WZ-9.)

Mr. Querques: Offered in bulk, sir, as WZ-10, articles from the New York Daily News, specifically January 23, 1969, January 24, 1969, February 12, 1969, June 24, 1969, July 9, 1969, and August 21, 1969.

(New York Daily News newspapers above referred to by Mr. Querques were received in evidence and marked Exhibit WZ-10.)

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Mr. Querques: Offered in bulk, your Honor, as WZ-11, the New York Post newspaper stories appearing in the issues of February 11, 1969, February 12, '69, June 11, '69, and July 9, '69.

(New York Post newspapers above referred to by Mr. Querques were received in evidence and marked Exhibit WZ-11.)

The Court: All right.

Mr. Querques: If your Honor pleases, I would like, in view of the progress we have been making, and in view of the procedure we have been following, I would like to make an additional offer of proof. I did intend to call two New Jersey State Troopers, one by the last name of [74] Trainor, that is Joseph Trainor, and one whose last name is Baum. I recite to the Court that I sincerely believe that if these two men were called and were to testify under oath, I would be able to establish from them that on the date of January 11, 1968, as a result of an arrangement made by me with one of these two men or with their Superior, I don't recall which it was, but in any event, as a result of an arrangement made by me, they appeared in my office to meet with Mr. Zicarelli, and as a result of meeting with Mr. Zicarelli, they put five questions, approximately, to him. Those questions related to an alleged bribery of the one superintendent of the State Police, Superintendent Capello, whether or not there was any activity with respect to a Major Haley of the New Jersey State Police. This investigation, as I un-

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derstand it, emanated as a result of one of the articles that appeared in one of the Life Magazines which your Honor now has before you, and I believe it is that particular Life Magazine article on September 8th, 1967. They would tell you that at that time Mr. Zicarelli invoked all his constitutional rights and refused to answer any of the questions on the advice of his attorney, to wit, myself. If these Troopers were to testify, they would also acknowledge and admit that they served on Mr. Zicarelli and his home in Cliffside Park, on the date of May 28, 1968, a subpoena directing Mr. Zicarelli to appear [75] as a witness in a Grand Jury investigation concerning homicides in Kings County, New York.

Mr. Phelan: The State Commission will stipulate to those facts, sir.

Mr. Querques: If your Honor pleases, with respect to my case on behalf of Mr. Zicarelli, I believe at this time I have submitted to you either by way of documentation, that is in the form of exhibits, or I have submitted to you by way of offers of proof everything that I intended to put before your Honor. The only thing I would like to renew is that application to come from your Honor directing the Commission to turn over to you the files that they have with respect to Mr. Zicarelli. So that everything else that we have put in evidence may cast its proper light on the total picture.

The Court: Well, I have already ruled on that.

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Mr. Querques: I just wanted to renew it.

The Court: I am not in the habit of changing my mind in such a short time.

Mr. Querques: It may be that after your Honor reviews this material, you might get curious.

The Court: It happens sometime, I will agree. I have been known to change my mind.

Mr. Querques: At this point, since all the testimony is in from us, I don't know if any of the [76] others want to present testimony, but, if not, I would think that we would now go to the area of the pertinency of the questions actually asked on August 20, 1969.

Mr. Phelan: In that connection, I wonder if you might mark as exhibits the transcript of the testimony which is certified by the Court Reporter.

The Court: Any objection?

Mr. Phelan: I also mentioned that the testimony of Mr. Occhipinti is before the Court in Judge Salvatore's matter.

Mr. Bozza: I would have no objection to your Honor having another one.

Mr. Querques: If your Honor please, I have no objection to the transcript being marked. However, I do have this request, and that is it be marked in such a way as to be impounded and constitute in effect a court exhibit so that it is not readily digestible by the public.

The Court: Well, since we are trying to keep the questions secret, I agree that I

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think that is so. Now, what about all of this?

Mr. Querques: I have the same feeling. I am not one to be a hypocrite. If that ruling is good for the Commission, that ruling is good for me. I don't intend for any of the material which I gave you to be disseminated either by or for either side. It is for your perusal and [77] your guidance, not the public.

The Court: Any objection to that?

Mr. Bozza: No.

Mr. Phelan: We have no objection.

The Court: All right.

I think we will mark this C-1.

Mr. Phelan: That will be the testimony of Mr. Zicarelli.

The Court: Mr. Zicarelli's testimony. (Stenographic transcript of testimony of Mr. Zicarelli above referred to by Mr. Phelan was received in evidence and marked Exhibit C-1.)

Mr. Phelan: The testimony of Mr. Russo will be C-2.

The Court: Mr. Russo's testimony is C-2.

(Stenographic transcript of testimony of Mr. Russo above referred to by Mr. Phelan was received in evidence and marked Exhibit C-2.)

The Court: Those exhibits that are marked, you better leave with me. This is Mr. Zicarelli's testimony. I think this is a copy of Mr. Russo's testimony.

Mr. Phelan: Yes. That will be fine.

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The Court: Now, let's see if I have the Occhipinti testimony? Well, I have an unmarked copy. Was that marked as an exhibit in the matter before Judge [78] Salvatore or not?

Mr. Phelan: It was not marked as an exhibit, your Honor. In that particular case, the Court Reporter actually read the questions and answers into the record.

Mr. Bozza: The testimony given by the Court Reporter that is contained therein.

The Court: Why don't we, to be consistent, mark this, too?

Mr. Phelan: That will be fine, too.

Mr. Bozza: I have no objection. Would that be C-3, Judge?

The Court: Yes. That will be C-3. (Stenographic transcript of the testimony of Mr. Occhipinti above referred to by Mr. Phelan was received in evidence and marked Exhibit C-3.)

Mr. Phelan: We also have for the record, your Honor, under that the exhibits which were attached to the petitions are being accepted by counsel for the witnesses, Mr. Zicarelli, Mr. Russo and Mr. Occhipinti, as establishing the procedural requirements of the Commission.

Mr. Querques: I am not so sure that I understand Mr. Phelan.

The Court: I have the petition here. Let's see what it is? I have a copy of it.

Well, there is a resolution. That is Exhibit A. [79] I have a subpoena and I have a letter of Notification dated August

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15, 1969, to the Attorney General relating to the immunity of the three witnesses, Mr. Zicarelli, Mr. Russo and Mr. DeCarlo, and a letter to the Prosecutor of Hudson County dated August 15, 1969, again relating to the proposed testimony of Mr. Zicarelli, and lastly the Resolution to compel the testimony, and again conferring immunity on Mr. Zicarelli.

Mr. Querques: Mr. Phelan has asked me to agree that he has followed the statute.

The Court: No. No. I think he asked that those exhibits be a part of the record.

Mr. Querques: Oh. If that is what he was asking then I have to concede that they were attached to the Petition and Order to Show Cause, because I have them, but I do think that in fairness to him and the Court, I should point out —

The Court: They will speak for what they are.

Mr. Querques: Right, but there is omitted any letter to the Prosecutor of Monmouth County, that county about which this investigation revolves with respect to Mr. Zicarelli.

Mr. Phelan: If it please the Court, at this time I would like to mark a copy of the letter that went to Mr. Keuper. Attached to it is a receipt signed by Mr. [80] Keuper that was returned to us. That letter is also dated August 15.

Mr. Querques: (Examining document.) May I check something? May I suggest, sir, that we be provided with a copy of that so

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our records would be complete? We had no knowledge of it until a minute ago.

Mr. Phelan: Yes.

The Court: That is C-4.

(Letter dated August 15, 1969, State Commission of Investigation, by Kenneth P. Zauher, to Vincent P. Keeper, Prosecutor of Monmouth County, above referred to by Mr. Phelan was received in evidence and marked Exhibit C-4.)

Mr. Phelan: Your Honor, may I request that I have copies made of this and leave the original with the Court so I will also have copies for the other counsel?

Mr. Pollack: I have a copy of that letter. It was in the petition that was given to me.

Mr. Bozza: And insofar as Mr. Occhipinti, we do have a copy of that letter. That is the one applying to Mr. Occhipinti.

The Court: Do you have one to make a copy?

Mr. Phelan: I do not, sir. If you care to read it first —

The Court: I assume it is similar to the other [81] letters. All right.

Well, now, we are down to the point of arguing about the questions, I take it.

* * *

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[127] September 18, 1969

[Appearances as hereinbefore noted.]

* * *

[Commencing at 145-16]:

Mr. Querques: . . . Now, Judge, if I may get back to the point with respect to the unconstitutionality of the immunity section of the statute. Again I am not going to argue the entire matter, because I know that you have read the briefs, and you have read the cases, but I do want to, as I said originally, add to that which is already in the brief, and I want to especially add to Section (b) of Point 2, wherein we took the position that the immunity provisions of the statute are in violation of the Fifth Amendment for failure to bar prosecution by a sister state or a [146] foreign sovereignty based upon compelled testimony.

Now, before I get into that, may I refresh your Honor's recollection by indicating that the other day when we were in executive session, if I may use that phrase, we put in the record certain documents which have been marked as exhibits, which have indicated as to my client, Mr. Zicarelli, he is now and has been a prime target for federal prosecution. There are other documents which indicate, and there was a stipulation which indicates that Mr. Zicarelli has been sought for purposes of interrogation and investigation in

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three counties of New York. As I recall them, Kings, Queens, and the Bronx.

Mr. Mathesius: I am going to respectfully object to this portion of Mr. Querques' argument which I thought we had discussed in chambers and which Mr. Querques asserted that this has already been submitted to the Court. It has already been discussed at length, and we are getting into the very area that Mr. Querques didn't want to get into. We are getting into it now only insofar as Mr. Querques wants to go. I assume that I will be the recipient of objection on the other side if I attempt to do the same thing. Therefore, I respectfully object to this portion of the argument which we are now getting into.

The Court: Well, I think we did discuss the matters that came up on Tuesday were over.

[147] Mr. Querques: That is correct.

The Court: And, of course, I indicated, and I realize that the question of the immunity granted by this statute certainly is a matter to be decided today, but I wish we would stop bringing out things that we did argue and were disposed of.

Mr. Querques: It wasn't intended that way, sir. If we just put this argument in its proper perspective — Now, it is because of what we talked about the other day, let me put it to you that way, that I urged upon your Honor what Justice Goldberg said in Murphy against the Waterfront Commission. Now, let me confess, I think all lawyers, when they read a case, they read it looking

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for a certain principle, and when they are reading it looking for one thing they miss everything else in the case. When we wrote this brief, we did not put in the brief a portion of the Murphy against the Waterfront Commission which is directly applicable here with respect to foreign prosecution.

If Mr. Zicarelli does have a problem with respect to foreign prosecution, then I say to your Honor that Murphy against the Waterfront Commission entitles him to invoke the Fifth Amendment in the State of New Jersey when asked a question, and that any offer of immunity under this statute in the State of New Jersey [148] does not nullify or negative or dissolve the right to take the Fifth Amendment. And I say that because Justice Goldberg said in the Murphy case, and he went all the way back — The interesting thing is he went all the way back to 1867, and discussed at length the case of United States of America against McRae, and when he decided the Murphy case, he gave United States of America against McRae vitality in 1967, 100 years later. And I think it is necessary for me to read, so your Honor can really appreciate it, what he said, because it pertains here exactly. He said in Murphy at page 688, 12 Lawyers Edition 2d, case beginning at page 678, "Where there is a real danger of prosecution in a foreign county, the case could not be distinguished in principle from one where a witness is protected from answering any question which has a tendency to expose him to forfeiture for a breach of

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our own municipal law." So there he is saying that if you are in New Jersey or any place in the United States where the Fifth Amendment pertains throughout the country, and you are asked a question, the answer to which could be a cue or a link in a chain of evidence which might tend to incriminate you in a foreign jurisdiction, since the offer of immunity cannot protect you in the foreign jurisdiction, you don't have to answer. And that, sir, is the situation here.

[149] The same situation pertains, albeit, somewhat differently, with respect to sister state prosecution. This statute — And let me say, before I go there, they have acknowledged — I hope I am not intruding on what we said, but there is an acknowledgment that there are some sister state problems, let's put it that way, with respect to Mr. Zicarelli. Now, if that be true, and questions are put to him here, and if they confer the immunity, as they have made the attempt, the inquiry then becomes one of where is the man's constitutional protection? How does Zicarelli or anybody else, for that matter, get protection from the conferring of immunity in the State of New Jersey when that immunity has no binding effect in a sister state, just as it has no binding effect in a foreign country? The answer, again, I think is rather clear, that it has no effect, as a result of which, sir, if New Jersey is permitted to offer and confer the immunity and make it stick, we have a clear violation of what Murphy against the Waterfront Commission

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intends to prevent, and that is you have the whip-sawing effect. You get him into one courtroom or one Grand Jury or one executive session here in one state and you ask him questions and you confer immunity and you whip-saw him, you whip-saw him back and forth until you hook him. And that is what Murphy says you can't do. Unfortunately for [150] us, or maybe fortunately — I don't know which. It depends on how you look at it. But Murphy only said we will not let you whip-saw a witness in a state court only to use that testimony in a federal court, and vice versa. We will not let you whip-saw him in a federal building only to get him into a state building where you use the information that you got by reason of the whip-saw in the federal building. But there is nothing on the books except the spirit of Murphy and the intelligence of the United States against McCrae, and the new vitality given to the McCrae case by reason of Justice Goldberg's decision in Murphy to prevent that from happening other than good common sense, hard logic and intelligent application of existing legal principles.

If they can't give immunity which is universal, which is complete, then they haven't given it. Don't offer me a meal and then only give me the dessert. If you offer me a meal, give me the soup, give me the meat and potatoes, and then give me dessert. Don't start out and end with the dessert. This immunity that they talk about in New Jersey is a ruse and a decoy to destroy.

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Now, I think, sir, I have argued the constitutionality question, and unless you want me to go further, I would think respectfully that we ought to stop at that point and then develop the others later, so we [151] can keep everything in perspective. I know Mr. Bozza and Mr. Pollack want to say something about the constitutionality, but I have said all I want to say.

* * *

[Commencing at 164-25]:

Mr. Zauber: . . . I would discuss very briefly the immunity [165] section. It seems very clear, if your Honor please, that with regard to an immunity conferred by anybody in this country, be it a Grand Jury, a court, an investigatory body such as the State Commission of Investigation, that in order for the witness to be fully protected, the protection given by the immunity must be coextensive with the privilege it seeks to displace. That is, subsequent to the witness having given testimony, he must be in the same position with regard to future prosecution that he was in prior to his having given the testimony. Now, this is known as a testimonial immunity. That is the conferring of an immunity such that the individual's testimony may not be used in a subsequent prosecution, nor may any fruits derived from that testimony.

Now, this is in contradistinction to what is known as a transactional immunity. That

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is that the individual may not be prosecuted for any transaction about which he testifies. Now, the type of immunity conferred by the statute which establishes the State Commission of Investigation is the former, that is it is a testimonial immunity and a more limited immunity, to be sure.

Now, the argument is made on behalf of the witness that this makes it constitutionally defective, that is that the immunity conferred in a statute [166] conferring a testimonial immunity is not sufficiently broad. I would respectfully urge that although it is true that many federal statutes, and indeed probably some other state statutes, confer a transactional immunity, that this is a broader protection than what is needed to confer upon a witness. What I mean by that is this; your Honor, the witness urges upon your Honor a holding that in order for an immunity to be adequate, it must be a transactional immunity. This is what has come to be known as a total bath. I would respectfully urge that the Constitution just doesn't have this kind of water in it. We need not confer a transactional immunity in order for that immunity section to be constitutional so long as any prosecution about a transaction about which the witness testifies is a prosecution based on untainted and independent evidence, then that prosecution is valid.

The witness wants a bonus, in other words. He wants the kind of protection which would completely wash out any prosecution in other

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jurisdictions or, indeed, within the confines of this State, even though that prosecution may have been developed completely on independent evidence. When I say "independent evidence," I mean independent from the testimony which he gives. I respectfully urge that the Constitution just simply [167] does not provide for this. The Fifth Amendment is a privilege against the use of an individual's testimony, and by subsequent judicial decree, the fruits of that testimony against the individual.

Now, it would be ludicrous to belabor that portion of the witness' argument which says that the immunity we conferred is inadequate because a sister state or a foreign jurisdiction may use that testimony, and there is no way on God's earth that we can prevent that. Well, your Honor, if we confer a transactional immunity, there is no way on God's earth that we could mandate the prosecutor of a foreign jurisdiction or the prosecutor of a sister state from utilizing that testimony. So that with respect to that argument, there would be no distinction whatsoever between a testimonial and a transactional immunity, and therefore, there could be no conceivable immunity statute which would be valid.

Further, if this argument were true, that is that the danger of a prosecution is a foreign jurisdiction would preclude the conferring of immunity within this jurisdiction, then the witness need only come in and say, "Well, I have committed a crime" or "It

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is alleged that I have committed a crime in a foreign jurisdiction or in a sister state, and an investigation is under way in that foreign jurisdiction, a continuing investigation [168] in a sister state, and, therefore, fellows, I am sorry, you can't confer any kind of immunity upon me that would be adequate, and therefore I need not testify." If your Honor please, Mr. Justice White in the Murphy case was not concerned with this type of argument. He laid it to rest. The Supreme Court of this State in *State vs. Spindel*, in upholding an immunity statute which conferred a testimonial immunity, was not concerned with this kind of argument.

I respectfully urge upon your Honor that although it is true that there are statutes which confer a transactional immunity, that this is not the kind of immunity which need be conferred upon an individual in order to give him the constitutional protection afforded by the Fifth Amendment, and that the testimonial immunity conferred upon any witness appearing before the State Commission of Investigation is adequate, and I rely upon the cases cited for your Honor and the distinctions in our brief of those cases cited by counsel for the witnesses, and the distinctions in those cases.

* * *

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September 18, 1969

[2] The Court: This matter has been brought before me as a result of a Verified Petition, executed by William F. Hyland, Chairman of the State Commission of Investigation, wherein he alleges that the Commission commenced an investigation into certain matters involving the City of Long Branch, and the County of Monmouth in New Jersey, and that pursuant to that investigation it caused a subpoena to be served upon the witnesses who appear before me and who are represented today, requiring them to appear before the Commission. Well, the witnesses appeared and all of them invoked their privilege against self-incrimination and refused to answer any of the questions which were asked of them by the Commission.

The Commission then moved and acted to compel this testimony and granted to the witnesses immunity from prosecution, and a Resolution to that effect was passed by the Commission. Thereafter, the witnesses appeared again before the Commission and again refused to answer the questions asked by the Commission, and again the witnesses invoked their privilege against self-incrimination, and that resulted in this petition being filed, and further resulted in the issuance of an Order to Show Cause why the witnesses should not be adjudged in contempt and committed to the Mercer County Jail until such time as they purge themselves of contempt by tes-

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tifying as ordered.

A number of issues have been raised in this case, [3] and I will try to go over them one by one. They were set forth in the briefs which were submitted, and again we had further argument on the issues Tuesday last and again today.

The first contention that is made is that the statute creating the State Commission of Investigation, and the statutory scheme under which it operates, violates the due process clause. Reliance is placed upon the case of *Jenkins vs. McKeith*, a United States Supreme Court decision, wherein was challenged a labor-management commission in the State of Louisiana. In effect, what the witness contends is that the New Jersey Commission is an accusatory body and that it fails to provide the requisite due process procedures called for in a hearing before such accusatory body.

The Louisiana commission was solely limited to criminal law violations, and there was nothing in the act which created it which provided that its findings were to be used for any legislative purposes. The United States Supreme Court in that case held it exercised an accusatory function. However, the Commission which is being challenged in this case is not so limited to criminal law violations. It does have the power to conduct investigations relative to the enforcement of the law of the State, the conduct of public officers and employees, matters concerning public peace, safety and

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justice, and all of these powers creating this Commission are set forth in Paragraph 2 to Paragraph 8 as has [4] been previously mentioned in the argument today.

It is my opinion that this matter before me is not controlled by the Jenkins case, since the functions of the two commissions are not entirely similar. Consequently, I determine that the New Jersey Commission is primarily investigatory in nature and not accusatory, as the one in Louisiana.

As a consequence of that, the procedural requirements necessarily surrounding accusatory proceedings are not requisite in the instant matter. As was stated in the case of *Hannah vs. Larche*, also a United States Court case, the investigative process could be completely disrupted if investigative hearings were transferred or transformed into trial-like proceedings.

There has been adopted in the state a code of fair procedure which is known as the Law of 1968, Chapter 316, and I feel that the procedures set forth therein, namely, that the witness is given a statement of the subject of the investigation. He has the right to be represented by an attorney. The attorney may submit proposed questions, and the Commission shall ask the witness such of the questions as it deems appropriate to the inquiry. And, finally, at the conclusion of the examination the witness has the right to file a sworn statement relative to his testimony which will be incorporated in the record. I feel that those rights granted a witness,

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together with the procedures set forth in the act [5] creating the Commission meet the requirements of due process guaranteed to a witness under the Constitution.

The next contention that has been made is that the immunity provision of the statute is unconstitutional and that it violates the Fifth Amendment in that absolute immunity is not granted against future prosecutions for any offense to which the question relates, and, further, that it doesn't bar federal prosecution or prosecution by another state or a foreign county. I might point out that this issue has already been raised in the federal courts and two federal judges have already ruled upon this contention and determined that the testimonial immunity provisions granted under this act meet constitutional requirements. The two judges who ruled on this are Judge Coolahan and Judge Hastie. I also concede, as has been pointed out to me, that I am not necessarily bound by their determinations, that I have the right and the privilege of determining that issue as I see it.

The privilege against self-incrimination protects disclosures which could be used in a criminal prosecution or which would lead to other evidence that might be so used. And I don't think that an immunity statute is rendered unconstitutional because it leaves the witness subject to a subsequent prosecution, either in this state, another state, federal court or in a foreign country, so long as there is no causal connection between the

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disclosure of the witness [6] and the evidence offered at the subsequent trial. The protection given by the immunity provision must be as broad as the Fifth Amendment privilege which it displaces.

The further contention is made that by the use of the phrase "responsive answer" as used in the statute, the witness is left to speculate whether or not his answer was responsive, and that he would be forced to answer without the security that he has gained immunity. As has been pointed out in one of the briefs, whether an answer given by the witness in good faith is responsive will ultimately have to be decided by a judge at a later hearing. I can't believe that any judge would subsequently determine that an answer given by a witness as responsive, and so accepted by the Commission as responsive, would not subsequently be held as being anything other than but responsive. I think the objection to that is somewhat far fetched, and, frankly, I don't think it is sufficient to render a statute compelling such an answer unconstitutional.

Again, it is my determination that the immunity provision of the statute does not violate the Fifth Amendment.

As to the argument that any testimony compelled to be given in this state might not be used in another state or federal court or a foreign country to develop further incriminating evidence, and thereby violating the due process clause of the Fifth and Fourteenth Amendments, in *Murphy* the [7]

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court stated that once a defendant demonstrates that he has testified in a state proceeding in exchange for immunity to matters related to the federal prosecution, the government can be put to show that its evidence is not tainted by establishing that it had an independent, legitimate source for the disputed evidence; that obviously applying only to other states and the federal court. However, as I indicated, I feel that the immunity provision contained in this statute is constitutional, and I join the two federal judges who so held that.

* * *

Order (Zicarelli)

(Filed 9/22/69)

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, MERCER COUNTY
DOCKET NO. L-41598-68**

In the Matter of :
JOSEPH ARTHUR ZICARELLI :
charged with Civil Contempt :
of the State Commission :
of Investigation :

This matter having been opened to the Court upon the application of the State Commission of Investigation, KENNETH P. ZAUBER, ESQUIRE and WILBUR H. MATHESIUS, ESQUIRE, counsel for the State Commission of Investigation, appearing, for an order committing the above-captioned witness to the Mercer County Jail for the contempt committed before the said State Commission of Investigation, MICHAEL A. QUERQUES, ESQUIRE, attorney for witness appearing in opposition thereto, and the Court having considered the briefs submitted and oral argument having been heard, and, in accordance with the oral opinion recited on the 18th day of September, 1969, in open court, and for good cause shown;

It is, on the 22nd day of September, 1969,

ORDERED that JOSEPH ARTHUR ZICARELLI is hereby committed to the Mercer County Jail until such time as he purges himself of contempt by testifying as ordered; and

125a

Order (Zicarelli)

It is FURTHER ORDERED that the said commitment is hereby stayed contingent upon a Notice of Appeal to be filed by September 29, 1969.

s/ Frank J. Kingfield
J.S.C.

Opinion

(Filed 1/20/70)

**SUPREME COURT OF NEW JERSEY
A-57/58/59 September Term 1969**

In the Matters of)

JOSEPH ARTHUR ZICARELLI,)
ROBERT BASILE OCCHIPINTI, and)
ANTHONY RUSSO, Charged with)
Civil Contempt of the State)
Commission of Investigation.)

JOSEPH ARTHUR ZICARELLI,)
ROBERT BASILE OCCHIPINTI, and)
ANTHONY RUSSO,)

Appellants,)

v.)

THE NEW JERSEY STATE COM-)
MISSION OF INVESTIGATION,)

Respondent.

Argued December 15, 1969 — Decided Janu-
ary 20, 1970

On appeal from the Superior Court, Law
Division, Mercer County.

Mr. Michael A. Querques argued the cause.

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for appellant Zicarelli; Mr. Samuel D. Pozza argued the cause for appellant Occhipinti (Mr. Daniel E. Isles and Mr. Harvey Weissbard, of counsel and on the brief; Messrs. Querques Isles & Weissbard, attorneys for appellant Zicarelli).

Mr. William Pollack argued the cause for appellant Russo.

Mr. Wilbur H. Mathesius and Mr. Kenneth P. Zauber argued the cause for respondent.

The opinion of the Court was delivered by WEINTRAUB, C. J.

Appellants refused to answer questions before the State Commission of Investigation (herein S.C.I.) and persisted in that refusal notwithstanding a grant of immunity. Upon the S.C.I.'s application to the Superior Court, each was ordered to be incarcerated until he answered. We certified their appeals before argument in the Appellate Division.

I.

Appellants contend the statute creating the S.C.I. denies due process of law in violation of the Fourteenth Amendment because individuals summoned before the Commission are denied the protections

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accorded an accused by the Bill of Rights.¹ The argument rests upon the false premise that the role of the S.C.I. is to decide whether an individual has committed a crime and to publicize the verdict. That is not its mission.

For this reason, appellants' reliance upon Jenkins v. McKeithen, ____ U.S. ____, 23 L. ed. 2d 404 (1969), is misplaced. That case involved a Louisiana statute which created a body called the Labor-Management Commission of Inquiry. The Commission consisted of nine members appointed by the Governor. The Commission could act only upon referral by the Governor when, in his opinion, there was substantial indication of "widespread or continuing violations of existing criminal laws" affecting labor-management relations. Upon such referral the Commission was to proceed by public hearing to ascertain the facts, and was required to determine whether there was probable cause to believe such criminal violation had occurred. Such findings were to be sent to appropriate federal or state law enforcement officials, and although not evidential in any trial, the findings were to be made public and could include conclusions as to specific individuals.

-
1. The S.C.I. contends that appellant Zicarelli is estopped to argue the constitutionality of the statute in its entirety or of the immunity provision because he was defeated on both scores in a proceeding in the United States District Court for the District of New Jersey and withdrew his appeal from the judgment there entered. We pass this objection since the issue must be met at the behest of the other appellants, and even as to Zicarelli "collateral estoppel" would not be a satisfying basis for decision.

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In Jenkins the trial court dismissed the complaint on motion. Four members of the Court, in an opinion by Mr. Justice Marshall, thought there was enough to warrant a hearing upon the complaint and hence reversed the judgment; two members of the Court thought the statute was invalid on its face; and the remaining three voted to affirm the trial court's judgment upholding the statute.

Mr. Justice Marshall stressed that the Commission had no role whatever in the legislative process. He pointed to the Commission's power to make public findings with respect to individual guilt of crime and cited the allegations in the complaint that the power was so used "to brand them as criminals in public" (____ U.S. at ____, 23 L. ed. 2d at 420). He continued that "In the present context, where the Commission allegedly makes an actual finding that a specific individual is guilty of a crime, we think that due process requires the Commission to afford a person being investigated the right to confront and cross-examine the witnesses against him, subject only to traditional limitations on those rights," and as well the right to call witnesses, subject to reasonable restrictions. (____ U.S. at ____, 23 L. ed. 2d at 421.) Finally the opinion emphasized that it did not hold that appellant was entitled to declaratory or injunctive relief but only that he was entitled to a chance "to prove at trial that the Commission is designed to and does indeed act in the manner alleged in his complaint, and that its procedures fail to meet the requirements of due process." (____ U.S. at ____, 23 L. ed. 2d at 422.)

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It should be stressed that both the plurality opinion and the dissenting opinion unreservedly reaffirmed Hannah v. Larche, 363 U.S. 420, 4 L. ed. 2d 1307 (1960), which had rejected a similar attach upon the statute creating the Civil Rights Commission. Distinguishing Hannah, Mr. Justice Marshall in Jenkins said (___ U.S. at ___, 23 L. ed. 2d at 419-420):

"The appellants in Hannah were persons subpoenaed to appear before the Civil Rights Commission in connection with complaints about deprivations of voting rights. They objected to the Civil Rights Commission's rules about nondisclosure of the complainants and about limitations on the right to confront and cross-examine witnesses. This Court ruled that the Commission's rules were consistent with the Due Process Clause of the Fifth Amendment. The Court noted that "[d]ue process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account." 363 U.S., at 442, 4 L. Ed. 2d at 1321.

In rejecting appellants' challenge to the Civil Rights Commission's procedures, the

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Court placed great emphasis on the investigatory function of the Commission:

"[I]ts function is purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative and executive action." 363 U.S., at 441, 4 L. Ed. 2d at 1320.

The Court noted that any adverse consequences to those being investigated, such as subjecting them to public opprobrium, were purely conjectural, and, in any case, were merely collateral and "not . . . the result of any affirmative determinations made by the Commission" 363 U.S., at 443, 4 L. Ed. 2d at 1322."

The S.C.I. is in no sense an "accusatory" body within the meaning of Jenkins. Rather, in words which Jenkins repeated from Hannah, the purpose of the S.C.I. is "to find facts which may subsequently be used as the basis for legislative and executive action." This plainly appears from a review of the statute.

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The S.C.I. consists of four members, two appointed by the Governor and one each by the President of the Senate and the Speaker of the General Assembly. N.J.S.A. 52:9M-1. Section 2 of the statute reads:

"The commission shall have the duty and power to conduct investigations in connection with:

A. The faithful execution and effective enforcement of the laws of the State, with particular reference but not limited to organized crime and racketeering;

b. The conduct of public officers and public employees, and of officers and employees of public corporations and authorities;

c. Any matter concerning the public peace, public safety and public justice."

Section 3 provides:

"At the direction of the Governor or by concurrent resolution of the Legislature the commission shall conduct investigations and otherwise assist in connection with:

a. The removal of public officers by the Governor;

b. The making of recommendations by the Governor to any other person or body, with respect to the removal of public officers;

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c. The making of recommendations by the Governor to the Legislature with respect to changes in or additions to existing provisions of law required for the more effective enforcement of the law."

Section 4 requires the S.C.I. to investigate any department or State agency at the direction or request of the Legislature or the Governor or such department or agency. Upon the request of the Attorney General, a county prosecutor or any other law enforcement official, the S.C.I. shall cooperate with, advise and assist them in the performance of their official powers and duties. Section 5. The S.C.I. shall cooperate with federal officials in the investigation of violations of federal laws within the State; section 6, and may consult and exchange information with officers of other States, section 7 and whenever it shall appear to the Commission that there is cause for the prosecution for a crime, or for the removal of a public officer for misconduct, the Commission shall refer the evidence to the officials authorized to conduct the prosecution or to remove the public officer. Section 8.

The legislative mission of the S.C.I., evident in section 3 quoted above, is emphasized by section 10 which reads:

"The commission shall make an annual report to the Governor and Legislature which shall include its recommendations. The commission shall make such further interim reports to the Governor and Legislature, or

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either thereof, as it shall deem advisable, or as shall be required by the Governor or by concurrent resolution of the Legislature."

Section 11 does provide that

"By such means and to such extent as it shall deem appropriate, the commission shall keep the public informed as to the operations of organized crime, problems of criminal law enforcement in the State and other activities of the commission."

but section 11 does not require the S.C.I. to make and publicize findings with respect to the guilt of specific individuals and thus does not invite the problem involved in Jenkins. In other words, the S.C.I. can respect the demands of due process without disobeying the letter or the spirit of the statute. Nor does the discretion given by section 12 to hold public hearings in any way mandate an infraction of any constitutional right. Under the statute the S.C.I. may, and under the Constitution it must, work within basic limits.

We add that nothing occurred in the present matter which suggests the S.C.I. intends to transgress those limits. The S.C.I. met the provisions of the Code of Fair Procedure (L. 1968, c. 376), N.J.S.A. 52:13E-1 to 10. A copy of that statute was served upon each appellant with the subpoena, and the subpoena contained a sufficient statement

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of the investigation.² N.J.S.A. 52:13E-2. The right to have counsel present and to receive his advice, N.J.S.A. 52:13E-3 was respected. The hearing was private. There has been no trace of a purpose to deny due process.

In sum, then, we have a typical commission created to discover and to publicize the state of affairs in a criminal area, to the end that helpful legislation may be proposed and receive needed public support. That the commission may also aid law enforcement by gathering evidence of crime and transmitting it to the appropriate agency for evaluation or prosecution does not militate against the power of the Legislature to seek the facts for its own purposes through such a commission. We do not suggest that a commission whose role was solely to aid the executive branch by ferreting out evidence of guilt for transmittal to the executive officers would be barred by the Federal Constitution. No provision of that instrument stands in the way. Nor do we understand appellants to say there is. The federal attack under the present point is based on the due process clause, and the

2. It read:

"Whether the laws of New Jersey are being faithfully executed and effectively enforced in the City of Long Branch, New Jersey, with particular reference to organized crime and racketeering; whether public officers and public employees in the City of Long Branch and in Monmouth County where it is located, have been properly discharging their duties with particular reference to law enforcement and relations to criminal elements; and whether and to what extent criminal elements have infiltrated the political, economic and business life of those areas."

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result does not turn upon whether the agency is characterized as "legislative" or "executive" or both. Rather the question is whether the agency, whatever its classic nature in the context of separation of powers, has an accusatory role, and if so, whether individual rights pertinent to an accusatory function have been denied. As to this, the answer is that the role of the S.C.I. is not accusatory and the rights accorded the individuals concerned are appropriate and adequate in the light of the agency's mission and powers.

We add that the United States District Court for the District of New Jersey rejected the same attack in Sinatra v. New Jersey State Commission of Investigation, decided January 9, 1970.

II.

Appellants contend the statute violates Article III, Para. 1, which reads:

"The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution."

The gist of the complaint seems to be that the statute's division of the power of appointment between the legislative and executive branches offends the provisions of the State Constitution dealing with appointments to office.

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Appellants say that if the S.C.I. is a legislative agency, the statute must fall because the power of appointment of two of the commissioners is allocated to the Governor. The power to appoint, as such, is not the special power of any one branch. Ross v. Board of Chosen Freeholders of the County of Essex, 69 N.J.L. 291, 294-296 (E. & A. 1903). The question then is whether there is something in the facts of this case which nonetheless requires the appointments to be made by the Legislature itself. We see no fundamental incongruity within the broad principal of Article III, Para. 1, quoted above, in permitting the Governor to appoint to a legislative agency. The Governor is a party to the legislative process. He is required to address the Legislature upon "the condition of the State" and to "recommend such measures as he may deem desirable." Art. V, §1, Para. 12. All bills must be presented to him for his approval or disapproval. Art. V, §1, Para. 14. Hence it cannot offend the policy of Art. III, Para. 1, to authorize the Governor to appoint to a "legislative" commission.

Now does any constitutional provision dealing with the specific subject of appointments forbid that course. On the contrary, the stated restriction with respect to appointments is upon the legislative branch alone. Art. IV, §V, Para. 5, provides that "Neither the Legislature nor either house thereof shall elect or appoint any executive, administrative or judicial officer except the State Auditor." See Richman v. Neuberger, 22 N.J. 28 (1956); Richman v. Ligham, 22 N.J. 40 (1956). Hence, if the S.C.I. is a legislative commission within the meaning of our State Constitution, no

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difficulty resides in the circumstances that the Governor shares the appointing power.

The alternative argument is that the S.C.I. must be deemed to be an executive agency and therefore the Legislature may not appoint because of the affirmative restriction upon a legislative appointment of any executive or administrative officer contained in Art. IV, §V, Para. 5, referred to above. In contending the S.C.I. is "executive" appellants stress the authority given the S.C.I. by the statutory provisions quoted in Point I to investigate at the request and in aid of the Governor or officers within his branch of government.

The power to investigate reposes in all three branches. Eggers v. Kenny, 15 N.J. 107, 114-115 (1954). And, absent a threat to the essential integrity of the executive branch, see David v. Vesta Co., 45 N.J. 301, 326 (1965), the Legislature may investigate official performance within the executive branch, for it is the responsibility of the Legislature to legislate with respect to executive offices and their powers and duties. This being an appropriate area for legislative inquiry, it is of no significance that Art. V, §IV, Para. 5, also empowers the Governor to investigate official performance within his department.

A separation-of-powers issue would arise only if the Legislature authorized the S.C.I. to go beyond investigation and to take action which invades an area committed exclusively to another branch. So, for example, if the S.C.I. were empowered to indict or to adjudicate charges of violation of our

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criminal laws, there would be an encroachment upon the judicial branch; David V. Vesta Co., supra, 45 N.J. at 326-327, and if the S.C.I. were authorized itself to prosecute criminal charges, the executive power would be involved. But the S.C.I. does none of this. Its investigation will at most yield material which may also be of interest to executive officials and be referred to them for handling. This being so, the S.C.I. is not vested with authority peculiarly executive in the sense of the separation-of-powers doctrine. Hence it cannot be said that the S.C.I. is an executive agency within the meaning of the provision barring legislative appointments of executive or administrative officers.

Nor does the statute offend Art. IV, §V, Para. 2, which reads:

"The Legislature may appoint any commission, committee or other body whose main purpose is to aid or assist it in performing its functions.* * *"

This provision appears to focus upon the power of appointment, and authorizes the Legislature to exercise that power if the "main purpose" is to aid or assist that branch of government and inferentially to deny that power if the "main purpose" is to aid or assist another branch.

We must assume the Legislature intended to abide by the Constitution and that the "main purpose" was to aid the legislative branch. That the S.C.I. is directed to investigate at the request of the

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Governor or agencies within his department does not point the other way. Notwithstanding the executive aid which may ensue, the legislative interest persists, for the legislative power touches all things, subject only to restraints the Constitution imposes. It being within the power of the Legislature to appoint to a commission to inquire into performance in public office, to trace the tentacles of crime in the public and the private sectors, and to inform the Legislature and the public to the end that the sufficiency of existing legislation or the need for remedial measures may be known, the legislative purpose remains dominant notwithstanding that the product of investigations will be available to the executive branch. The separation-of-powers doctrine contemplates that the several branches will cooperate to the end that government will succeed in its mission. It is consistent with the legislative responsibility to provide that a legislative agency shall investigate an area of legitimate legislative interest upon an executive request or shall alert law enforcement agencies, state and federal, with respect to criminal events it uncovers. Hence the assistance to the executive branch, state and federal, does not dispute the premise that the "main purpose" of the S.C.I. is legislative.

III.

Appellants contend the immunity provision of the statute violates the Fifth Amendment guarantee that no person "shall be compelled in any criminal case to be a witness against himself."

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N.J.S.A. 52:9M-17(b) provides that a person complying with the S.C.I.'s order to answer "shall be immune from having such responsive answer given by him or such responsive evidence produced by him, or evidence derived therefrom used to expose him to criminal prosecution or penalty or to a forfeiture of his estate." Several objections are raised to the constitutional sufficiency of this immunity.

The first is that the statute does not grant a "transactional" immunity, *i.e.*, from prosecution for the offense to which the compelled testimony relates, but rather grants only a "testimonial" immunity, *i.e.*, protection against the use of the compelled testimony and the fruits thereof leaving the witness subject to trial upon the basis of other evidence the State acquires independently of that testimony. We believe the statute need go no further.

Appellants rely upon Counselman v. Hitchcock, 142 U.S. 547, 35 L. ed. 1110 (1892). There the statute protected the witness from the use of the evidence obtained from him but did not forbid the use of other evidence to which the witness's testimony might lead. The Court made it plain that the Fifth Amendment would not be satisfied unless the witness were also shielded from the evidence the prosecution uncovered by reason of the leads obtained from the witness, but in its final statement the Court spoke in terms which could be found to be more demanding. It said (142 U.S. at 585-586, 35 L. ed. at 1122):

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"We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the incriminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates. In this respect, we give our assent rather to the doctrine of Emery's Case, in Massachusetts, than to that of *People v. Kelly*, in New York; and we consider that the ruling of this court in *Boyd v. United States*, 116 U.S. 616, supports the view we take. Section 860, moreover, affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party."

The last sentence in this quotation observes that the statute did not protect against use of the fruit of the compelled testimony, and thus states a narrower basis for decision than the opening proposition that a statute will not suffice unless it grants an absolute immunity from prosecution.

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The application of the self-incrimination clause to a defendant in a criminal proceeding is evident and simple, but the Constitution is read to protect as well a witness in every proceeding, and here difficulties arise. When the private interests of a witness are served by his silence, it is at the expense of litigants who need his testimony or at the expense of the State if the Witness thereby withholds what the public needs to know in a judicial or legislative inquiry. Discordant values are involved and the task is to reconcile their demands.

One approach could be to require the witness to answer and then to shield him from the use of the testimony thus compelled. We did that in a setting in which the good faith of the asserted fear of incrimination could not be tested. State v. De Cola, 33 N.J. 335 (1960). In general, however, the courts chose to permit the witness to refuse to answer, but since, if that right were absolute, the State could be denied evidence it needed for public prosecutions or investigations, the competing values were adjusted by requiring the witness to testify if the State conferred an immunity which would leave him no worse off than if his claim to silence had been allowed. On the face of things, an immunity against prosecution would exceed what the Fifth Amendment protects, for the Fifth Amendment protects the witness only with respect to what the witness himself can furnish and not from evidence from other sources.

At the time Counselman was decided, the immunity question concerned only the jurisdiction which sought to compel testimony. Counselman

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dealt with a federal statute and with the restraint the Fifth Amendment imposed upon the federal government. Since then the Fifth Amendment has been found to apply to the States as well, and in addition the view has taken hold that evidence the federal government or a State obtains by forbidden compulsion may not be used by either jurisdiction. In that setting, the scope of the required immunity assumes new significance. If the immunity must protect against prosecution with respect to any offense, both state and federal, to which the testimony relates, the States would be unable to compel testimony no matter how urgent the public need since they could not immunize a witness from federal prosecution. And although the Congress can, in furtherance of federal investigations, bar state prosecutions, still, the State's responsibility and interest in criminal matters being usually more pervasive and demanding, it might be too high a price to pay. See Knapp v. Schweitzer, 357 U.S. 371, 378-379, 2 L. ed. 2d 1393, 1400 (1958). In this new setting, the more acceptable solvent is to protect the witness against the use of his compelled testimony by both jurisdictions but with each remaining free to prosecute on the basis of evidence independently obtained.

The problem was accordingly resolved in those terms in Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 12 L. ed. 2d 678 (1964). The case involved a New Jersey statute which granted immunity from state prosecution but of course did not purport to protect the witness with respect to federal offenses. On the basis of prior

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decisions of the United States Supreme Court, we held the statute was valid even though the witness remained subject to federal prosecution. In re Application of Waterfront Commission of N.Y. Harbor, 39 N.J. 436 (1963). The United States Supreme Court agreed that the statute should be upheld, but upon the ground that the witness would indeed be protected in a federal prosecution by virtue of the Fifth Amendment itself. This conclusion had to reject the thesis that the Fifth Amendment required an immunity from prosecution rather than an immunity from the use of the coerced testimony. Indeed, Murphy read Counselman v. Hitchcock to have denounced the statute there involved, not because it failed to provide for immunity against prosecution, but because it did not protect the witness from the use of the fruit of the compelled testimony (387 U.S. at 78-79, 12 L. ed. 2d at 694-695). Murphy concluded in these words (378 U.S. at 79, 12 L. ed. 2d at 695):

"* * * we hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. This exclusionary

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rule, while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity."

That Murphy rejected the view that the Fifth Amendment requires a grant of immunity from prosecution was emphasized in the concurring opinion of Mr. Justice White (378 U.S. at 93, 12 L. ed. 2d at 703).

In Albertson v. Subversive Activities Control Board, 382 U.S. 70, 15 L. ed. 2d 165 (1965), the Court, in summarizing Counselman v. Hitchcock, did include a reference in Counselman to "absolute immunity against future prosecution for the offense to which the question relates" but this issue was not in focus, and the opinion did not stop there, but rather pointed out that the immunity statute before it did not protect against the use of the compelled statement as evidence in all situations nor against the use of the leads it furnished (382 U.S. at 80, 15 L. ed. 2d at 172). The question whether an immunity against compelled testimony and its fruits is enough was left open in Stevens v. Marks, 383 U.S. 234, 244, 15 L. ed. 2d 724, 732 (1966). But in Gardner v. Broderick, 392 U.S. 273, 20 L. ed. 2d 1082 (1968), the Court said that "Answers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its

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fruit in connection with a criminal prosecution against the person testifying," citing both Counselman and Murphy (392 U.S. at 276, 20 L. ed. 2d at 1085). Thus the view of Murphy was reasserted.

We are satisfied that the Fifth Amendment does not require immunity from prosecution. An immunity of that breadth exceeds the protection the Fifth Amendment accords. More importantly to find that demand in the Fifth Amendment would in practical terms deny state government access to facts it must have to meet its duty to secure the well-being of all the citizens. We heretofore deemed the Constitution to require immunity against use of testimony rather than immunity from prosecution, see State v. Spindel, 24 N.J. 395, 404-405 (1957), and recently our Legislature, in adopting the Model State Witness Immunity Act, substituted an immunity from use for an immunity from prosecution. See In re Addonizio, 53 N.J. 107, 114-115 (1968).

There is a difference in that Murphy dealt with a federal-state setting whereas we are here dealing with the claim that our statute does not protect a witness from prosecution under our state law. But the question in both is the same, i.e., what immunity the Fifth Amendment requires in exchange for compulsion to answer. The values involved are the same. We see no sensible basis for a different answer. Gardner v. Broderick treated the issue as one and the same, citing both Counselman and Murphy. Murphy held and Gardner repeated that the Fifth Amendment requires protection only from the use of the compelled testi-

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mony and the leads it furnishes, and that protection our statute expressly provides. See United States v. McClosky, 273 F.Supp. 604 (S.D.N.Y. 1967); Application of Longo, 280 F.Supp. 185 (S.D. N.Y. 1967).

The remaining questions concerning self-incrimination may be disposed of quickly. It is contended the statutory immunity is inadequate because it does not protect a witness with respect to a prosecution in a sister State or in a foreign land. As to a sister State, it seems clear that if the Fifth Amendment requires protection against the use of the testimony by a sister State, the Amendment itself will provide that protection. Murphy can mean no less. United States v. McClosky, *supra*, 273 F. Supp. at 606; Application of Longo, *supra*, 280 F.Supp. 185; cf. In re Flanagan, 350 F.2d 746, 747 (D.C. Cir. 1965). As to a foreign land, even if Murphy means that liability under foreign law is now relevant, the danger in the case before us is too imaginary and unsubstantial to sustain a refusal to answer. See Murphy, 378 U.S. at 67-68, 12 L. ed. 2d at 688.

Nor do we see substance to the complaint that our statute protects the witness only with respect to "responsive" answers or evidence. The limitation is intended to prevent a witness from seeking undue protection by volunteering what the State already knows or will likely come upon without the witness's aid. The purpose is not to trap. Fairly construed, the statute protects the witness against answers and evidence he in good faith believed were demanded.

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IV.

The orders under review provide that appellants shall be incarcerated until they answer the questions they refused to answer. Appellants contend the statute authorizes only a penal prosecution for contempt of the Commission, for which a fixed sentence must be imposed.

With reference to "contempt" of court, we have tried to distinguish sharply between (1) the public offense, i.e., "contempt," for which the court may punish the offender and (2) the injured litigant's right to apply for relief to satisfy his private claim arising out of the same offending act or omission. New Jersey Department of Health v. Roselle, 34 N.J. 331 (1961); In re Application of Waterfront Comm. of N.Y. Harbor, *supra*, 39 N.J. at 466; In re Carton, 48 N.J. 9, 19-24 (1966); In re Buehrer, 50 N.J. 501, 515-516 (1967). The procedure and rights of the person concerned depend very much upon the purpose of the proceeding, and hence our rule of court prescribes the processes carefully, to the end that he may know at once whether he is to meet a penal charge or the civil claim of a litigant, and may be afforded the rights appropriate to the proceeding. R. 1:10-1 to 5.

It would be helpful if legislative draftsmen abided by our semantics, but we cannot insist that they shall. Our responsibility remains to find and enforce the legislative intent.

N.J.S.A. 52:9M-17b provides that a person given immunity "may nevertheless be prosecuted for any

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perjury committed in such answer or in producing such evidence, or for contempt for failing to give an answer or produce evidence in accordance with the order of the commission, * * * Appellants insist this language contemplates a penal prosecution and nothing else. But the sense of the situation goes strongly against that limitation, for the mission of the S.C.I. is to obtain facts for the Legislature and the mere punishment of a recalcitrant witness would not achieve that end.

We can think of no reason why the Legislature would want to permit a witness to block the inquiry if he is willing to accept a penalty. Mindful, as we are, that the expression "prosecution for contempt" has been used widely to describe a proceeding arising out of contumacy, whether the object of the proceeding is to compel compliance or to punish for noncompliance or both, we must seek the legislative design in that light, notwithstanding that the terms employed are not the ones we prefer. Here we have no doubt that the Legislature intended the S.C.I. to obtain the facts, whatever the wish of the person subpoenaed. The very provision for a grant of immunity repels the notion that a witness may choose to be silent for a price.

Nor is it critical whether the statutory language fits snugly within our rule of court relating to judicial proceedings in aid of subpoenas of a public officer or agency. R. 1:9-6. Subsection (a) deals with ex parte applications for compliance, subsection (b) with applications for compliance made on notice, and (c) with applications to

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"punish" where a statute authorizes that course. These provisions were intended to reflect statutory provisions of which the draftsmen of the rule were aware. Needless to say, the rule does not mean that the judiciary will withhold its hand unless the statute falls within the language of the rule. R. 1:1-2 provides that "In the absence of rule, the court may proceed in any manner compatible" with the purpose "to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." Here appellants were plainly informed that the objective of the proceedings was to have them jailed until they complied with the order of the S.C.I. There can be and there is no complaint on that score.

We should add some further observations. The section of the statute here involved deals with defiance of the order of the S.C.I. itself rather than with defiance of an order obtained by the agency from a court. We see no difficulty in the circumstance that the statute does not call for an intermediate order by a court to be followed by enforcement of the court's mandate, but we point out that the absence of such an intermediate step does not deny a witness the opportunity to have the court pass upon the validity of the agency's order to answer. There was no misunderstanding here in that regard. Appellants were heard fully upon the propriety of the questions. They do challenge the validity of certain questions but there is no charge that the hearing before the trial court upon those objections was inadequate.

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V.

The remaining issues warrant little more than mention.

Zicarelli and Occhipinti charge that the questions put to them offended their freedom of association guaranteed by the First Amendment. Sweezy v. New Hampshire, 354 U.S. 234, 1 L. ed. 2d 1311 (1957), which they cite, dealt with a legislative inquiry into political associations. Here the questions relate to an allegedly massive criminal organization, and to the witness's associations in that context. The subject matter is incontestably criminal and the interest of the State is manifest. We see no affront to the values protected by the First Amendment.

Appellants complain that the questions "sought to probe into the most secret recesses of the witness' minds and to expose these private thoughts to public view," and this they say is barred by the Fourth Amendment, alone or in conjunction with the First and Fifth Amendments. Granted the right of the Legislature to inquire, the pertinency of the questions and the sufficiency of the immunity with respect to self-incrimination, all of which must be accepted for the immediate purpose, the proposition advanced, simply stated, is that the Constitution prohibits a subpoena to a mere witness. It is plainly frivolous.

Appellants' reliance upon the Sixth Amendment appears to raise no issue beyond the due process question discussed in "I" above.

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Their further claim that if the statute is valid, it nonetheless has been so applied or implemented as to violate the Constitution has no basis.

The trial court properly refused to permit an examination of the Executive Director of the S.C.I. as to whether the agency already had the information it sought from appellants or whether the S.C.I. was following a path revealed by illegal wire-taps or bugging. As to the first, it would be an unwarranted interference with the legislative branch thus to superintend its exercise of its constitutional authority to investigate. It is difficult to conceive of a showing which would justify that course. Surely nothing before us suggests a serious issue in that regard.

With respect to the effort to learn whether evidence illegally obtained prompted the legislative investigation or the questions put to appellants, they cite no authority for the extraordinary proposition that such illegality will taint the legislative process. The suppression of the truth because it was discovered by a violation of a constitutional guarantee is a judge-made sanction to deter insolence in office. It is invoked in penal proceedings, and then only at the behest of a defendant whose right was violated. Farley v. \$168,400.97, 55 N.J. 31, 47 (1969). Even there, the wisdom of a suppression of the truth is not universally acknowledged. Farley, supra, 55 N.J. at 50. Appellants ask us to go further, and to suppress the truth on behalf of a mere witness, to the end that he may choose to be silent. Still more, appellants ask that we visit the sanction upon the

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legislative process, even though that process cannot result in a judgment against them. Pressed relentlessly and without regard to all other values, the sanction thesis could indeed deny the Legislature access to facts, and even taint a statute adopted in response to facts illegally revealed, but we think such an extension would be absurd.

Finally, Russo asserts the questions put to him are improper because they allegedly enter an area in which he had been convicted of perjury. The conviction, as described in his brief, was for perjury in denying to a grand jury that he had said to a policeman that he, Russo, had the Mayor and some councilmen of the City of Long Branch "in his pocket." We do not see a problem. His testimony before the S.C.I. could not be used in a retrial of that perjury charge. Nor do the questions here involved include the one which led to the conviction, so as to raise the prospect that if Russo repeats his former testimony he will be indicted on a fresh charge of perjury. We need not anticipate issues such an indictment might raise.

The orders are affirmed.

Order - United States Supreme Court

March 1, 1971

**91 ZICARELLI V. NEW JERSEY STATE COMM'N
OF INVESTIGATION**

In this case probable jurisdiction is noted limited to questions 1, 2, 3, and 4 as set forth in the jurisdictional statement which read as follows:

"1. Whether a state immunity statute, and in particular N.J.S.A. 52:9M-17, which merely prevents the subsequent use of a witness's testimony and evidence derived therefrom is sufficient to supplant the Fifth Amendment's privilege against self-incrimination?

"2. Whether Counselman v. Hitchcock, 142 U.S. 547 (1892), which stated that 'absolute immunity against further prosecution' is required before the Fifth Amendment privilege may be supplanted, is still the law of the land?

"3. Whether the immunity statute in question, N.J.S.A. 52:9M-17 is constitutionally defective due to its provision that only a 'responsive' answer, or evidence derived therefrom will not be used against the witness, where the statute provides no guidelines for determining what is a 'responsive' answer?

"4. Whether the immunity statute, N.J.S.A. 52:9M-17, can supplant the Fifth Amend-

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ment privilege when it fails to provide immunity against foreign prosecution, with respect to an individual who has a real fear of such foreign prosecution?"

As to all other questions set forth in the jurisdictional statement, the appeal is dismissed for want of a substantial federal question.

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Exhibit WZ - 5B Life Magazine, Sept. 1, 1967

COVER

LIFE

BRAZEN EMPIRE OF ORGANIZED CRIME

The Alarming Growth of a Multibillion-Dollar Cartel
Founded on Corruption, Terror and Murder

Proconsul of the Boston Gang War

* * *

Actually "Bayonne Joe" Zicarelli's outwardly modest position as head of a bookie and lottery syndicate in Hudson County does him considerable injustice. True, in New Jersey, his interlocking tie-ups with scores of Hudson County officials are so expensive that some gangsters consider him a "connection-crazy" wastrel. But Zicarelli has an international sideline so extensive that he's practically a one-man state department for the Mob. He has holdings in Venezuela and the Dominican Republic, and throughout the hemisphere is known as the man to see for guns and munitions when a government is to be overthrown or a rebellion is to be put down. For example, through the years he shipped arms to Dominican leaders, selling with fine and profitable impartiality to Trujillo and the men who overthrew him. (In next week's issue more will appear on Zicarelli's business interests.)

Even Zicarelli's domestic connections extend well beyond the confines of Hudson County, into the chambers of the U.S. Congress itself. Indeed, he is on the best of terms with the widely respected Democratic representative from Hudson County, Congressman Cornelius E. Gallagher. Gallagher is one of the bulwarks of the House Foreign Affairs Committee and was seriously mentioned before the 1964 Democratic convention as a possible running mate for Lyndon Johnson. Bayonne Joe and his congressman seem to have a lot to talk over, judging from the frequency of their get-togethers. These usually take place a long way from Washington or Bayonne—where Gallagher lives and Zicarelli runs the rackets. Sometimes the setting is a picturesque wayside inn off the Saw Mill River Parkway, north of New York, and the occasion is an unhurried and chummy Sunday brunch.

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Exhibit WZ-5C Life Magazine, Sept. 8, 1967

COVER

LIFE

Brazen Empire
of Crime, PART II

HOW THE MOB MUSCLES INTO YOUR DAILY LIFE

Exhibit WZ - 5C Life Magazine, Sept. 8, 1967

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**The brazen attempt to spring
Hoffa with a \$1 million bribe
A case of**

THE FIX

Hidden Flow of the Skim

The foremost internationalist among all Cosa Nostra entrepreneurs is neither skimmer nor stock swindler, but old Bayonne Joe Zicarelli—the Hudson County hustler of goods and politicians. “Joe Z’s” extensive line includes military aircraft parts, munitions and murder contracts.

Although Zicarelli, at 55, isn’t a top-notch in the Mob, the international operations he has conducted from the Manhattan of-

fices of the Latamer Shipping Co. show how well an enterprising Cosa Nostra second-stringer can make out if he hustles.

Zicarelli and the former Dominican Republic dictator, Rafael Trujillo, were fast friends. Trujillo shelled out more than \$1 million to Joe for machine guns, bazookas, etc. With Trujillo’s assassination, Zicarelli quickly proved he is without political bias: early this year, the U.S. State Department found

Exhibit WZ - 5C Life Magazine, Sept. 8, 1967

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that Joe's emissaries were dickering with present Dominican leaders to take over an airline.

Another friend was erstwhile Venezuela President Pérez Jiménez, during whose dictatorship Zicarelli landed a \$380,000 contract to supply aircraft parts to Venezuela. Profit: some \$280,000.

This was by no means the extent of Joe Z's Common Market. In the 1950s, when his deals with Venezuela were cooking, Zicarelli staunchly volunteered to officials of that country to arrange the assassination of the exiled Venezuelan political leader Romulo Betancourt. The plot bogged down in unseemly haggling over Zicarelli's fee: \$600,000.

There is no measure of how much money Zicarelli made from Trujillo. But in the past two years federal investigators have discovered that he did a lot of work, whatever the price. Details of just how much he did have never been disclosed until now. One of his little favors for Trujillo: the 1952 execution of Andres Requena, an

anti-Trujillo exile. Zicarelli gunmen shot Requena in Manhattan.

Next on Trujillo's list was another exile, Jesús de Galindez, a teacher at Columbia University. Joe Z arranged that one, too. In a famous case, De Galindez was kidnaped in Manhattan on March 12, 1956. At a Long Island airport, he was loaded aboard a private plane and flown by an American pilot, Gerald Murphy, to the Dominican Republic. Both De Galindez and Murphy vanished and are presumed to have been slain.

The plane used by De Galindez' abductors was chartered at the Linden, N.J. airport on March 5, 1956. Federal authorities have learned that the aircraft was chartered by Joe Zicarelli.

On his home ground in Bayonne, Joe Z has performed similar services for prominent people. For example, in the fall of 1962, the body of a Bayonne gambler was hauled by Zicarelli's men from the home of a Hudson County political figure—placing the politician more than slightly in Zicarelli's debt.

THE MOB

This is the story of the corruption of a U.S. congressman by the Mob. Not just any congressman, but one of influence and importance both within the U.S. government, and, to an extent, abroad—the Honorable Cornelius E. ("Neil") Gallagher, Democrat from New Jersey's 13th Congressional District, a key member of the House Committee on Foreign Affairs and the House Government Operations Committee, the chairman of the U.S. and Canadian Interparliamentary Group, and a former U.S. delegate to the Disarmament Conference. Gallagher, a man as prominent in the party as he is in government, was among the handful seriously considered by Lyndon B. Johnson as a possible running mate. He would have made an attractive candidate. He has

good looks, charm, intelligence—he once taught at Rutgers. His war record is impressive—as a captain he commanded a rifle company in Europe in World War II and Korea and was wounded three times, winning eight decorations.

As previously revealed in LIFE's continuing series on the Mob and its enterprises, organized crime has succeeded in planting its poisonous roots deep in American business, inside labor unions and city and state government. Now, an eight-month investigation by a team of LIFE reporters has established that the Mob has gauged yet another choice plum. Behind the facade of prestige and respectability lives another Neil Gallagher—a man who time and again has served as the tool and collaborator of a Cosa Nostra gang lord.

Organized crime continued: the case of a respected lawmaker

caught up in the grasp of Cosa Nostra

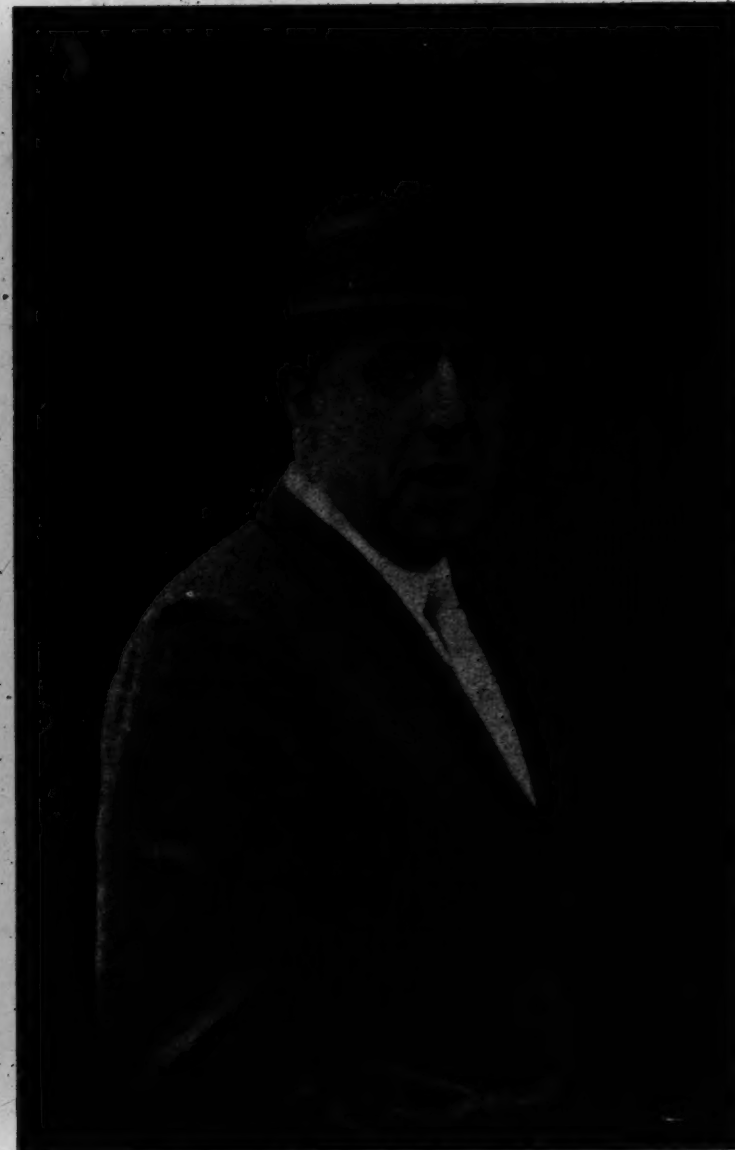
The Congressman and the Hoodlum

THE MOB

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In appearance—silver-haired, ruddily handsome—Congressman Cornelius E. Gallagher is the image of a dedicated public servant. Opposite is a man of another sort, gangster Joe Zicarelli, a New Jersey capo in Cosa Nostra. Ties bind the congressman and the hoodlum in an alliance of interests.



This article was prepared by a LIFE investigative team consisting of Russell Sackett, Sandy Smith and William Lambert.

Congressman Neil Gallagher's tie-in with this glowering Cosa Nostra figure, Joe Zicarelli, has ranged from his own home turf in Bayonne, N.J. to points as far distant as Montreal and Santo Domingo, capital of the Dominican Republic. It has involved such diverse interests as "fixes" with local New Jersey police, Caribbean politics, the promotion of a contraband "cancer cure" and a gangster's weird tale about the disposal of a corpse.

The story of Gallagher's availability to run the Mob's errands begins with conversations he had in the summer of 1960 with Zicarelli. The latter had a complaint. The police had strayed out of line and were putting heat on some of his men in the gambling rackets. Zicarelli wanted this nonsense stopped.

In Cosa Nostra, Zicarelli holds the rank of capo, or captain, in the fearsome Joe Bonanno "Family." In the rackets he is known by the nickname Joe Bayonne, derived from the New Jersey industrial waterfront city, which squats opposite Manhattan's towering financial district. This is Zicarelli's—and Gallagher's—power base. To Zicarelli, a political "connection"—or "The Fix"—is a thing of beauty, like cash in a Swiss bank, or two star sapphire pinky rings. Racketeering in all its profitable and ugly aspects is Zicarelli's trade, and his connections have kept him operating.

Above all, Zicarelli is cagey. For a long time, he followed the practice of issuing his orders to captive New Jersey politicians from public telephones.

On the morning of Monday, June 13, 1960, authorities began electronic surveillance of a Manhattan bar telephone booth from which Zicarelli conducted his business. They were interested solely in the mobster. The congressman came into the inquiry unexpectedly, and what to do about this has been troubling officials of the

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On June 13, from the pay telephone, Zicarelli called Gallagher's unlisted telephone at the congressman's law office in Bayonne. There was no answer. Zicarelli called the congressman's home. Gallagher wasn't there, either.

A week passed. The following Monday, June 20, Zicarelli called Gallagher's law office once again and placed two more calls to the congressman's home. Again Gallagher was out and this time Zicarelli asked the woman who answered to tell the congressman to "call Mr. Gray at the Murray Hill number."

On the next day, June 21, Zicarelli finally got through to Gallagher on the unlisted office telephone. He complained that the Bayonne police had staked out the

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key stations of his gambling network. His business was being disrupted, Zicarelli huffed, by the treachery of a top police official.

"O.K.," said Gallagher. "Let me get hold of him right now."

A few hours later, Zicarelli phoned Gallagher again at his office, demanding to know what the congressman had done for him.

"I got hold of a friend who said [the police official] was jumping," said Gallagher. "I got a hold of the little guy in Jersey City and told him to reach out for him [the police official]."

That night, a messenger from Bayonne appeared at the West Side apartment used by Zicarelli as a Manhattan hideaway. With the authorities listening in, he gave the gangster some bad news.

"One of the lightweights [an honest policeman] grabbed a guy [a Zicarelli runner] with a bag of money—return money," the messenger said. "Later, I laid it in to ----- [naming a Bayonne policeman]. I said you guys are wrong here, taking out money and then hugging people."

Zicarelli cautioned the messenger to keep his coat. "I talked to the top man," counseled Zicarelli. "Take it easy. Don't get excited. He'll see [the police official] tomorrow."

The following day, June 22, Gallagher called Zicarelli at the pay phone and was told that, so far as Joe was concerned, things were getting worse. Zicarelli understood that Hudson County authorities

had requested help from the New Jersey State Police to suppress gambling in Bayonne, and he wanted to know if there was any way the state police could be headed off.

"That has already been taken care of," replied Gallagher. He explained that a "meeting" had taken place that day and that he would have the "answer" in a short time.

'Mr. Gray' got him off the House floor

Zicarelli was unwilling to wait. On June 23 he telephoned Gallagher's home and tersely left word for the congressman to "call Mr. Gray."

It was two days later, Saturday, June 25, before Gallagher returned the call to Zicarelli at the pay phone. This colloquy followed:

Gallagher: I got hold of those people [Bayonne police] and there will be no further problem.

Zicarelli: I hope so, because they're ruining me.

Gallagher: They damn well better not.

Zicarelli: They're doing a job on me like was never done before.

Gallagher: I laced into them.

Gallagher said he would "fol-

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low through" on the job. He explained that he was going to Washington, and said that if Zicarelli would call him there he would call back.

A few days later Zicarelli, using the name of "Mr. Gray," did telephone Gallagher's office in Washington. One of the congressman's aides told him that Congress was in session and Gallagher was on the floor of the House of Representatives.

"Well, get him off the floor—this is important," commanded Zicarelli.

The aide, shaken by the imperious manner of "Mr. Gray," suggested that Mr. Gray call the Capitol direct. Zicarelli did, and Gallagher quickly left the House floor at the word that Mr. Gray was calling. The "important" message was simply that Joe Zicarelli wanted to see his congressman as soon as possible.

That telephone conversation was followed by a number of Sunday morning meetings between Gallagher and Zicarelli. Some of these brunch powwows (LIFE, Sept. 1, 1967) were uncovered by authorities who had Zicarelli under surveillance.

Small wonder, then, that Justice Department officials, who knew about Gallagher's connections with the Cosa Nostra capo, were apprehensive about testifying before a House subcommittee a year ago last spring (see box).

Under the chairmanship of

Dante B. Fascell, the hearings were delving into the federal effort against organized crime—and right there big as life-sat subcommittee member Gallagher. It was, as one Justice employe was later to observe, a little like having your cotton crop investigated by a boll weevil.

Gallagher had meanwhile become—with Missouri's Senator Ed Long (LIFE, May 26 and Nov. 10, 1967 and July 26, 1968)—a leading congressional spokesman against government invasions of privacy, including the very investigative technique that had first disclosed his own alliance with the Mob.

As the hearing proceeded, Congressman Gallagher reflected self-assurance in his questioning of a succession of federal enforcement officials. The thrust of his remarks was that organized crime—specifically the Mafia—was a vastly overblown concept, and that the federal effort against it was too big a weapon for the size of the target, and that innocent people could be wrongly damaged through unwitting association with mobsters.

"Sometimes I have the feeling," he said, "as we go down the path into all sorts of uncharted areas, especially in the area of computers and the invasion of privacy, that if there had been no Mafia, perhaps Big Government would have had to invent one."

In due course he came around to what might have been most on his mind. "When you get into the exotic fields that the organized

"crime unit has got into . . . it is quite conceivable that anybody who ever was in the same theater with an organized crime identified type is going to find that moment in his life frozen into a government computer, and forever more he remains part of the organized crime complex."

Early last month three LIFE reporters paid a visit to the congressman's offices in Washington after he had agreed to discuss the information gathered by this magazine. With Attorney Lawrence I. Weisman at his side, Gallagher was asked if he had "any association" with Zicarelli.

"No," said the congressman.

After that flat assertion, the following was said:

Q: [You] never called him or talked to him?

A: Let me tell you something. Can I talk off the record? I want to level with you. I want to level with you.

Q: I don't think we ought to get off the record on a thing like this.

A: Okay, then, we won't. Mr. Zicarelli on several occasions has called me—ah, one way or another—about his son who was a doctor trying to get into med school and he thought he was being discriminated against. . . . One day he called me straight here.

Q: Did you say he called you here?

A: A long time ago. I think twice. I think when the kid was trying to get into medical school.

Q: At your office?

A: Yes. And I think one time in the hustle and bustle and nobody was here and the phone call came through over in the other place [the House]. It was over on the floor . . . he called there cold

and said: "I hope you don't mind." I tried to brush him off as best I could, saying it was a long day or something. He said: "Well, I'm a taxpayer. . . . Well, you know, kiddingly, or whatever the hell."

Q: Did you ever get any calls from a Mr. Gray?

A: Mr. Gray. . . . I think that is who he [Zicarelli] said he was. I don't know. He didn't say who was . . . I think that's probably how the hell he got on the line.

Q: Why would he get on the line any faster if he said he was Mr.

Joe Zicarelli needed help to buy an airline

Gray than if he said he was Mr. Zicarelli?

A: Well, I wouldn't get on the line if I knew it was Mr. Zicarelli. You know, you've got to try to be circumspect about these goddam things and not hurt a person's feelings or get anybody angry at you.

Q: But you did know who he was?

A: What?

2

Q: Do you know who Joe Zicarelli was?

A: Not the first time. Not the first time. I guess he just figured I got it through one time before. But I would try to duck it as much as I could.

At another point in the interview, Gallagher was asked, "Did you ever telephone Zicarelli?"

"Never," he replied.

Q: Absolutely never?

A: Never.

Q: It's not possible that you're making a mistake?

A: That I called Joe Zicarelli? No.

Gallagher also denied that he had met with Zicarelli at any time, in a restaurant or any other place. At this point, Attorney Weisman interjected:

"The congressman said that they [the meetings] did not take place. I haven't talked with the congressman about this but I'll put something on the table and test your sense of fairness. He's willing to take . . . I would advise him to take a lie detector test to determine whether these are the facts. . . ."

Gallagher quickly cut in:

"Hey, let me say something. I don't believe in lie detector tests. They're snake oil. That's one of the reasons I'm where I am, because of the investigations that I've had with all this stuff and I became a target because. . . . I believe there should be some integrity in what the hell we do and not believe in the whole question of the drift toward a police

state and McCarthyism with its new name, Mafiaism. And probably that's why I'm being slammed a little bit right now."

Q: The information we have is that you did, in fact, intercede for Zicarelli with the Bayonne police department to slow up investigations that the Bayonne police were making into his lotteries and other gambling that he has over there. Now, I'd like a response to that.

A: I categorically deny that that ever happened. I never had any influence with the police in Bayonne.

Q: Did you ever speak to any public official in Bayonne in connection with Joe Zicarelli's operations?

A: I have—uh—Joe Zicarelli is like a legend in Bayonne. All the ex-fighters and all the people who he probably handed out money to, to help, or something . . . I don't know.

Q: Did you ever speak to a public official in Bayonne in connection with Joe Zicarelli's interests?

A: No, I never did.

Later the interview got into the fact that Gallagher currently is one of three partners in a home construction firm in Bayonne, known by a number of names including Edmart, Inc. The other two partners are Dr. Martin Turkish, a Bayonne physician, and Edward Slifka. At the time of Zicarelli's overheard phone calls, as it turns out, Slifka was the deputy police commissioner of Bayonne.

The congressman seemed especially ill at ease when questioned

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about Edmart.

Q: Were you equal partners in this thing, Congressman?

A: A . . . yes. I hesitate on it because on . . . of the things that I did not like to appear as a partner on the building was, if you're in politics you obviously . . . what I'm undergoing now is . . . takes place many times. But the other problem in politics is that if you appear as a principal in building there are all kinds of people in . . . local political people who set up straw men [so] that you would have to call them and say: "Would you please remove that straw man?" It might be just the issuance of a permit, or a water pipe, or to turn the heat on, whatever the little thing may be. They set up a pattern of harassing you to the point where . . . and as soon as you call them for that they say: "Oh, by the way, I've got a brother-in-law. Can you get him a job?" Or whatever. It's give and take like that. So for those reasons I never really appeared as an equal partner, but in fact I am an equal partner. I appear as the attorney.

Q: Has it been lucrative?

A: Well, I can't say that I'm getting rich on it. But it's \$25,000 . . . \$30,000 . . .

Q: Has it been producing that every year?

A: I can't say it produced it this year.

Slifka, the congressman's present partner, also had turned up in the electronic surveillance over

Zicarelli.

On Sept. 15, 1960, when he was still deputy police commissioner, he called Zicarelli on the pay telephone the gangster was using at the time. Slifka wanted Zicarelli to know that Gallagher was off on a 10-day trip.

"I know, I spoke to him earlier," said Zicarelli. "Where's he going?"

Europe and Africa, Slifka answered proudly. "He's no longer a kid," he said. "He's representing the U.S. all by himself. He's the next governor. He was at the armory this morning and they gave him an ovation as big as Kennedy's [President John F. Kennedy]." Slifka and Zicarelli agreed that Neil Gallagher certainly was a fine fellow.

Secret traffic in an illegal 'cancer drug'

Among Gallagher's considerable attributes, so far as Zicarelli was concerned, was his seat on the prestigious House Foreign Affairs Committee. For all his small-town nickname, Joe Bayonne had important foreign affairs of his own—among others, with the Dominican Republic, to which he sold arms during the terrorist regime of Ra-

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fael Trujillo.

In the scramble that followed Trujillo's assassination, however, Zicarelli was reaching for a new grip. When Joaquin Balaguer—once Trujillo's puppet president—was elected head of state in 1966, Zicarelli saw his chance to get control of the republic's faltering airline, *Compañía Dominicana de Aviación*. Even as a legitimate business its prospects were good, once the tourists started returning. But as a licensed international carrier which *Cosa Nostra* could put to use in all the shady trades in which it specializes, it could be a flying bullion lode.

The gangster's attorney, Stephen Hoffman, who had served as registered agent for Balaguer during the latter's exile in the U.S., was on hand for Balaguer's inauguration on July 1, 1966. Gallagher also was there, in the official delegation from Washington. Early the following year, on a visit that some federal authorities are convinced was directly connected with Zicarelli's bid for the airline, Hoffman flew down again. So did Congressman Gallagher—on the same plane, in fact. They met and talked.

President Balaguer later confided to a friend that Gallagher, during his visit, had professed himself interested in sugar investments "and any other kind of business deal he can put together." Indeed, the congressman told embassy officials on arriving that the nature of his trip was "personal." Yet Gal-

lagher told LIFE that the trip had the official sanction of the Foreign Affairs Committee and various government departments he had consulted. The committee, he said, had picked up the tab for the trip.

Even so, the U.S. embassy in Santo Domingo was embarrassed by the circumstances of Gallagher's visit and the fact that it coincided with that of Hoffman, whose Balaguer-Zicarelli affiliations were well known. Embassy officers cabled Washington that the congressman had assured them he was "trying to keep Hoffman at arm's length." (Later Gallagher told LIFE he had never discussed Hoffman's presence with anyone at the embassy.) Ambassador John H. Crimmins told the State Department he regretted Gallagher's involvement in the island republic, and said it appeared the congressman was "naive."

Despite the efforts of his envoys, Zicarelli never did pull off the airline deal. But the activity in Santo Domingo does follow a pattern that repeats itself where Zicarelli and the congressman are concerned: when and where the gangster needs influential help, along come Congressman Gallagher. Another example: Laetrile.

Laetrile, a purported cancer drug, is manufactured in Canada by a firm called Biozymes International Ltd. and promoted by the McNaughton Foundation. Both are headed by Andrew R.L. McNaugh-

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ton, the swashbuckling son of the late General A.G.L. McNaughton, distinguished Canadian soldier and diplomat. The use of Laetrile, which is made chiefly from an extract of peach and apricot pits, is illegal both in Canada and in the U.S. If it could be government approved Biozymes International stock would become very valuable indeed. This was a situation bright with the prospects of profit for a man like Joe Zicarelli, with his Washington connections.

The McNaughton Foundation gives callers the names of four doctors said to be treating cancer patients with the drug. One of the doctors is located in Italy, two others in Mexican border towns.

The fourth doctor practices in Union City, N.J.—the heart of Zicarelli country—at the clinic where Joe Zicarelli himself is being treated for "anxieties." (The doctor told a LIFE reporter Zicarelli is receiving "placebo therapy," i.e., sugar pills, for his nerves.)

In a remarkably candid interview with two LIFE reporters in Montreal on May 1, McNaughton admitted: "I am doing something highly illegal in your country.

"First of all," he said, "the diversion of Laetrile from Canada to the U.S. is an offense against the Canadian food and drug regulations. Secondly, it's an offense against the American food and drug regulations. Thirdly, it's an illegal act to take it across the border—and I suppose you could find 10 other crimes that are involved

in it. We are doing this on a reasonably large scale. . . ." Zicarelli, said McNaughton, has an interest in smuggling Laetrile into the U.S., where he said at least 150 patients are now being illegally treated with the drug. McNaughton said that Steve Hoffman, who had been his attorney and a stockholder in Biozymes International, had introduced him to Zicarelli. He also said he strongly suspects that the gangster, using another man's name as a front, had donated between \$100,000 and \$130,000 to the nonprofit McNaughton Foundation. And he guessed that Zicarelli might, under someone else's name, also be a stockholder in Biozymes.

It was Hoffman, according to McNaughton, who also introduced him to "the man who can do the job [for Laetrile] in Washington . . . introduce us around, get us favorable consideration from the Food and Drug Administration." Enter, once again, Congressman Gallagher.

"Gallagher was to take us to the Veterans Administration, Bethesda [Naval Hospital], Walter Reed, you name it," said McNaughton. "Hoffman said, 'Gallagher's the man.' I said, well, he'll expect some recompense, and Hoffman said, 'We'll work it out.'" Gallagher denied that anyone talked to him about recompense. The appointments were made, all right, but the presentations misfired and Laetrile remains an unauthorized and, for

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now, unprofitable drug.

Congressmen often do constituents favors and see that they get hearings in the halls of the capital. Gallagher claimed that is all he was doing for Laetrile—at the request of a constituent, Dr. John A. Morrone. Now deceased, Dr. Morrone was a Jersey City surgeon and a close friend of Joe Zicarelli.

As it turns out, helping Dr. Morrone was not Congressman Gallagher's only interest in the contraband drug. Until recently one of the directors of Biozymes was Gallagher's friend and law partner, E. A. ("Ed") Dembe. Of the total stock issue of Biozymes, the largest single block—some 1.2 million shares—is held in the name of the Broadway National Bank of Bayonne. Ed Dembe is one of the bank's owners. Congressman Gallagher is a director.

Dembe claims he did not know of Gallagher's connections with Laetrile at the time he became a director of the manufacturing firm and later when he agreed to let his bank become nominee for the Biozymes stock in a strange agreement with an old friend of his, Steve Schwartz. (Schwartz is a gun-runner and international operator

who is tied to mobster Carmine Galante, a fellow capo of Zicarelli's in the Bonanno Family of Cosa Nostra. Schwartz was also in Santo Domingo at the same time Gallagher and Hoffman were there, but no one is quite sure why.) Dembe told two LIFE reporters he presumed the stock actually belonged to Schwartz, but "I never had a pinpoint, detailed, hold-'em-up-against-the-wall conversation with Steve" about it. Dembe said the stock certificates are not held in the Bayonne bank, but "someplace up in Canada."

Gallagher claims he knew nothing of his partner's or the bank's involvement with the stock until "after you fellows talked to Ed die."

When interviewed by LIFE, all parties—McNaughton, Hoffman, Dembe and Congressman Gallagher—made essentially the same request: don't write anything that's going to hurt the fight against cancer. Gallagher was asked if a congressman wasn't sticking his neck out a bit to go to bat for a cancer drug unknown to him, being promoted by men he claimed were virtual strangers. "Look," he said, "if Bonnie and Clyde had a cure for cancer, you should listen."

JURISDICTIONAL STATEMENT

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In The

Supreme Court of the United States

69-4

No. [REDACTED]

JOSEPH ARTHUR ZICARELLI,

Appellant,

vs.

THE NEW JERSEY STATE COMMISSION OF INVESTIGATION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

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APPENDIX

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In The
Supreme Court of the United States

No.

JOSEPH ARTHUR ZICARELLI,

Appellant,

vs.

**THE NEW JERSEY STATE COMMISSION OF
INVESTIGATION,**

Appellee.

On Appeal from the Supreme Court of New Jersey

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of New Jersey, entered on January 20, 1970, which affirmed an order of the Superior Court of New Jersey, Law Division, Mercer County (dated September 22, 1969), and submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

Opinion Below

The opinion of the Supreme Court of New Jersey is not yet officially reported and is attached hereto as Appendix A.

Jurisdiction

The proceeding below was instituted as a result of a petition by William F. Hyland, Chairman of the New Jersey State Commission of Investigation, a body created and governed by N.J.S.A. 52:9M-1 et seq. The petition requested, and resulted in, the issuance of an order to show cause why appellant should not be adjudged in contempt due to his failure to answer certain questions before the Commission after purportedly having been granted immunity pursuant to N.J.S.A. 52:9M-17, and why he should not be committed to jail until such time as he should purge himself of the contempt. The order to show cause was issued on August 20, 1969, and a hearing was held thereon in the Superior Court, Law Division, Mercer County, on September 16 and 18, 1969. On the latter date the trial court found appellant to be in contempt of the Commission and ordered him to be committed to the Mercer County Jail until such time as he should purge himself of contempt by testifying before the Commission as ordered.

The judgment of the Superior Court was entered on September 22, 1969. The judgment of the Supreme Court of New Jersey, which affirmed the action of the trial court, was entered on January 20, 1970, and the notice of appeal was filed in that court on February 2, 1970. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States

Code, Section 1257(2). With respect to the non-appealable issues presented herein, jurisdiction is sustained by Flournoy v. Wiener, 321 U.S. 253, 256 (1943).

Questions Presented

The following questions are presented by this appeal:

1. Whether a state immunity statute, and in particular N.J.S.A. 52:9M-17, which merely prevents the subsequent use of a witness's testimony and evidence derived therefrom is sufficient to supplant the Fifth Amendment's privilege against self-incrimination?

2. Whether Counselman v. Hitchcock, 142 U.S. 547 (1892), which stated that "absolute immunity against further prosecution" is required before the Fifth Amendment privilege may be supplanted, is still the law of the land?

3. Whether the immunity statute in question, N.J.S.A. 52:9M-17 is constitutionally defective due to its provision that only a "responsive" answer, or evidence derived therefrom will not be used against the witness, where the statute provides no guidelines for determining what is a "responsive" answer?

4. Whether the immunity statute, N.J.S.A. 52:9M-17, can supplant the Fifth Amendment privilege when it fails to provide immunity against foreign prosecution, with respect to an individual who has a real fear of such foreign prosecution?

5. Whether the statute creating the New Jersey State Commission of Investigation, N.J.S.A. 52:9M-1 et seq., both on its face and as applied in this case, violates the due process clause of the Fourteenth Amendment by its failure to provide the minimal due process standards set forth in Jenkins v. McKeithen, ___ U.S. ___, 23 L. Ed.2d 404 (1969)?

6. Whether the decision in this case, which interprets N.J.S.A. 52:9M-17 as providing for incarceration of a witness who refuses to answer questions before the State Commission of Investigation after having been granted immunity, until he answers such questions, but which provides no expiration date for the incarceration, violates the due process clause of the Fourteenth Amendment and the Eighth Amendment's ban on cruel and unusual punishment?

7. Whether inquiry into a witness's association with others, unrelated to specific criminal conduct, violates the First Amendment's right to freedom of association?

8. Whether inquiry into a witness's beliefs, criminal or otherwise, violates the First Amendment?

Statutes Involved

New Jersey Statutes Annotated, 52:9M-1 to 9M-18, and 52:13E-1 to 13E-10, are set forth at length in Appendix B hereto. N.J.S.A. 52:9M-17, which is the immunity section of the above statute, provides as follows:

"a. If, in the course of any investigation or hearing conducted by the commission pursuant to this act, a person refuses to answer a question or questions or produce evidence of any kind on the ground that he will be exposed to criminal prosecution or penalty or to a forfeiture of his estate thereby, the commission may order the person to answer the question or questions or produce the requested evidence and confer immunity as in this section provided. No order to answer or produce evidence with immunity shall be made except by resolution of a majority of all the members of the commission and after the Attorney General and the appropriate county prosecutor shall have been given at least 24 hours written notice of the commission's intention to issue such order and afforded an opportunity to be heard in respect to any objections they or either of them may have to the granting of immunity.

"b. If upon issuance of such an order, the person complies therewith, he shall be immune from having such responsive answer given by him or such responsive evidence produced by him, or evidence derived therefrom used to expose him to criminal prosecution or penalty or to a forfeiture of

his estate, except that such person may nevertheless be prosecuted for any perjury committed in such answer or in producing such evidence, or for contempt for failing to give an answer or produce evidence in accordance with the order of the commission; and any such answer given or evidence produced shall be admissible against him upon any criminal investigation, proceeding or trial against him for such perjury, or upon any investigation, proceeding or trial against him for such contempt."

Statement

Appellant was subpoenaed to appear before the New Jersey State Commission of Investigation, a body created pursuant to N.J.S.A. 52:9M-1 et seq. (118a).¹ The subpoena stated that the investigation concerned, generally, the enforcement of the law in Long Branch, New Jersey with particular reference to organized crime and racketeering. The reverse side of the subpoena set forth the text of N.J.S.A. 52:13E-1 et seq., which was the Act establishing a code of fair procedure to govern state investigating agencies and which applied to the hearing before the Commission. Pursuant to the subpoena appellant appeared before the Commission on July 8, 1969. He was ordered to return on July 10 and, in response to questions asked of him on that date, invoked his privilege against self-incrimination and refused to answer. He was then ordered to reappear on August 20, 1969.

1. References are to the page numbers in the Joint Appendix filed with the Supreme Court of New Jersey and which has been certified to this Court as a part of the record below.

On August 20, appellant appeared before the Commission in executive session, and was asked a series of 100 questions. Appellant was purportedly granted immunity pursuant to N.J.S.A. 52:9M-17 but asserted his privilege in response thereto (42a-87a). In asserting his privilege appellant, through counsel, specifically challenged the constitutionality of the statute under which the Commission operated (46a), the constitutionality of the immunity provision (49a-50a), the invalidity under the Eighth Amendment of the contempt process (49a), as well as raising other constitutional infirmities in the hearing process and stating some of the reasons therefor (46a-50a). Immediately upon completion of the questions, appellant was served with a petition and order to show cause returnable forthwith before a Judge of the Superior Court (113a-124a). The order directed appellant to show cause why he should not be adjudged in contempt and committed to the Mercer County Jail until such time as he purges himself of contempt by testifying as ordered (126a).

On September 16, a hearing was held upon the Order to Show Cause. During the course of the hearing counsel for the Commission and counsel for appellant agreed to stipulate certain matters which appellant had sought to prove during the hearing. These were as follows:

"(1) That Zicarelli had been the object of very extensive publicity referring to him not only as a racketeer and a member of Cosa Nostra, but also an 'internationalist' in

crime [10-21 to 25].²

(2) That Zicarelli's activities, associations, and reputation are well known to the Commission [11-2 to 5].

(3) That Zicarelli had been the subject of numerous subpoenas, surveillances and investigations over the past ten years by both federal and state authorities [11-8 to 12].

(4) That Zicarelli was, by governmental pronouncement, a main or prime target for prosecution [11-5 to 8]."

Also placed in evidence at the hearing was a newspaper report, stipulated to be essentially correct, of an extensive interview with the Executive Director of the Commission (52-13 to 53-10; 184a-187a) as well as numerous newspaper and magazine articles dealing with appellant and his reputed activities (55-17 to 61-25). It was also stipulated that detectives from the New Jersey State Police had questioned appellant in January, 1968 concerning the alleged bribery of a former state police superintendent and that the state police had also served Zicarelli with a subpoena in May, 1968, directing him to appear before a grand jury in New York (73-21 to 75-5).

2. These pages and line references are to the official transcript of the September 16 and 18 hearings which were filed with the Supreme Court of New Jersey and have been certified to this court as a part of the record below.

How the Federal Questions are Presented

The opinion of the Supreme Court of New Jersey ruled upon all but one of the constitutional questions presented on this appeal. The decision rejected appellant's contention that:

"the statute creating the Commission denies due process of law in violation of the Fourteenth Amendment because individuals summoned before the Commission are denied the protections accorded an accused by the Bill of Rights" (App. A 3a).

In this respect it found that appellant's reliance on Jenkins v. McKeithen was "misplaced." With respect to appellant's argument concerning the immunity provision, N.J.S.A. 52:9M-17, the court held that a grant of "testimonial immunity" is sufficient to supplant the Fifth Amendment privilege against self-incrimination and that "transactional" immunity, or immunity from prosecution, need not be provided (App. A 15a-22a). The court held that Counselman v. Hitchcock requires no more. The court likewise considered, and rejected, appellant's claim that the statute failed to provide immunity from foreign prosecution (App. A 22a) and that its provisions requiring a "responsive answer" made it unconstitutional (App. A 22a). Appellant's First Amendment attacks on the proceedings were also rejected (App. A 26a). All of these same questions were raised initially in the trial court and ruled upon by it. However, since the issues were actually considered and decided by the State Supreme Court reference to the lower court proceedings is not deemed necessary. Charleston Federal Sav. & Loan Assn. v. Alderson, 324 U.S.

182 (1944), rehearing denied, 324 U.S. 888. The only issue presented herein which was not passed upon the Supreme Court was that respecting the constitutionality of the indefinite incarceration for contempt. However, that issue was raised and ruled upon by the trial court (8-25 to 9-17) and was fully briefed in the Supreme Court (App. Brief 74-76).³ Thus, it is properly before this Court.

The Federal Questions are Substantial

1. This case squarely presents the question of the validity of a state immunity statute which merely provides immunity from the use of the compelled answer or its fruits, but which fails to provide for immunity from prosecution. The Court below held that N.J.S.A. 52:94-17(b) was constitutional despite its failure to accord appellant "transactional immunity," and further held that an immunity of that breadth "exceeds the protection the Fifth Amendment accords." That ruling raises a substantial issue of the first magnitude and one that is of great importance to both state and federal governments.

As recently as Stevens v. Marks, 383 U.S. 234 (1965), both Mr. Justice Douglas speaking for the Court, Id. at 244, and Mr. Justice Harlan, joined by Mr. Justice Stewart, concurring in part and dissenting in part, Id. at 249, noted that the validity of such a statute as sufficient to supplant the constitutional privilege against self-incrimination is still an open question. While noting that Counsel-

3. That brief has been certified to this Court as a part of the record below.

man v. Hitchcock, 142 U.S. 547, 586 (1892), pointed to a negative answer, Mr. Justice Harlan felt that "the question ought not to be decided until it is necessarily presented after a full briefing and argument by the parties" 383 U.S. at 249. This case squarely and necessarily presents that issue.

Counselman v. Hitchcock, supra, held that the constitutional privilege against self-incrimination cannot be supplanted by legislation unless the immunity given is as broad as the scope of the privilege itself. The court stated as follows:

"We are clearly of the opinion that no statute which leaves the party or witness subject to prosecution after he answers the incriminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates" 142 U.S. at 585-586. (Emphasis added.)

Both Congress and the states have, with few exceptions, read Counselman as requiring immunity from prosecution. For the past seventy years virtually every major federal regulatory statute has included such an immunity provision. 8 Wigmore, Evidence §2281, n. 11 (McNaughton ed. 1961); Wendel, Compulsory Immunity Legislation

and the Fifth Amendment Privilege, New Development and New Confusion, 10 St. Louis U. Law J. 327, 371 (1966); Note, 72 Yale L.J. 1568, 1611 (1963). Indeed, as recently as 1968 in the most wide ranging immunity act ever passed, Congress adhered to the Counselman requirement, 18 U.S.C. §2514. The states have likewise, with rare exception, followed suit. See the cases collected in 53 A.L.R. 2d 1030, despite the fact, that until 1964 they were not interpreting a federal constitutional requirement. Over the years this Court also has continued to cite Counselman with approval, e.g. Ullman v. United States, 350 U.S. 442 (1956).

Confusion, however, entered the scene with Murphy v. Waterfront Commission of New York, 378 U.S. 52 (1964). That decision concerned the question of whether

"one jurisdiction within our federal structure may compel a witness whom it has immunized from prosecution under its laws, to give testimony which might then be used to convict him of a crime against another such jurisdiction" 378 U.S. at 53..

While purporting to apply Counselman, Id. at 78, Mr. Justice Goldberg held:

"...the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We con-

clude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits" Id. at 79.

In his concurring opinion, Mr. Justice White, joined by Mr. Justice Stewart, stated that in his view Counselman did not require immunity from prosecution, Id. at 100-107. The majority, as noted, did not purport to abandon Counselman but rather reaffirmed its validity. If, however, Counselman's requirement of absolute immunity from prosecution set forth a constitutional principle then Malloy v. Hogan, 378 U.S. 1 (1964) would have had the necessary effect of making that same requirement obligatory upon the states. However, if Murphy is read to require only immunity from use, then the Court was actually narrowing the privilege while purporting, at the same time, to extend it. Since Murphy was directed only to an inter-jurisdictional situation it can be argued that it did not reach the intra-jurisdictional holding of Counselman and thus left that decision unaffected. Thus, there would be two co-existing standards, one for intra-jurisdictional situations and another for inter-jurisdictional. Note, 61 Northwestern U. L. Rev. 654, 666 (1966). However, such a construction, it has been noted, would run afoul of this Court's rulings in other areas which have sought to prevent double standards for state and federal governments. Note, 20 Rutgers, L. Rev. 336, 344 (1966).

Reading Murphy as replacing immunity from

prosecution with immunity from use, it has been subject to extensive criticism by distinguished commentators. Professor Wendel, has stated that Murphy "added new confusion to an already troubled legal principle" 10 St. Louis L.J. at 328. He suggests that Mr. Justice Goldberg's language was "inadvertent," and that the decision "leaves immunity legislation on balance as unsettled as ever." The issue was put cogently by Professor Duncan:

"Either Counselman is constitutionally necessary, in which case the Murphy rule permits encroachment upon the privilege with serious consequences for the values protected by the privilege, or else Murphy is constitutionally adequate and Counselman grants an unnecessary measure of immunity with unacceptable social costs to the community when individuals escape the application of criminal sanctions." Duncan, Federalism and the Fifth; Configuration of Grants of Immunity, 12 U.C.L.A. L. Rev. 561, 578 (1965).

For other criticisms, see 39 N.Y.S.B.J. 105 (1967). Mr. Justice White's concurring opinion has been likewise subject to attack. Note, 20 Rutgers L. Rev. 336, 340 (1966); Wendel, supra.

The opinion below held that "Murphy rejected the view that the Fifth Amendment requires a grant of immunity from prosecution." Two lower federal court decisions appear to have also accepted this view. United States v. McCloskey, 273 F. Supp. 604 (S.D.N.Y. 1967); Application of Longo, 280 F. Supp. 185 (S.D.N.Y. 1967). It is difficult,

however, to see how that comes about in light of the statements in the subsequent case of Stevens v. Marks, supra, that the question is still open. The matter is even further clouded by seemingly conflicting references to Counselman in the post-Murphy decisions of Albertson v. Subversive Activities Control Board, 382 U.S. 70, 80 (1965) and Gardner v. Broderick, 392 U.S. 273, 276 (1968). The questions involved are substantial and are important if Congress and the States are to be guided correctly in their enactment of immunity legislation. What is undoubtedly the most significant federal immunity statute ever considered is presently pending in the Congress, S. 30, 91st Cong. 2d Sess. §201 et seq., which would repeal all existing federal immunity legislation and substitute therefore a single, all-encompassing immunity provision which would only provide for testimonial immunity. This clearly points up the significance of the question posed in this case.

2. The immunity statute in question also presents the substantial question as to whether it runs afoul of the constitution by imposing a condition upon the grant of immunity. The statute protects the witness only if his answer is "responsive." Our research reveals no other immunity statute with such a provision. The court below rejected this attack by noting that the witness would be protected against answers which "he in good faith believed were demanded." However, the witness would be placed in the untenable and precarious position of not having any assurance at the time the answer is given that years later, perhaps, it may not be used against him as a result of a finding by another court that, in retrospect, his answer was not responsive. It is gen-

erally held that a grant of immunity may not be made dependant on a condition: Annotation, 53 A.L.R.2d 1030, 1051; Ferrantiello v. State, 256 S.W.2d 587, 595 (Tex. Ct. Cr. App. 1953). This provision thus destroys even the limited grant of immunity conferred by the statute. It not only fails to fully supplant the constitutional privilege, but would seem to render the statute void for vagueness. This Court has often held that language which leaves one uncertain as to the conduct it prohibits fails to meet the requirements of the Due Process Clause. Giaccio v. Pennsylvania, 382 U.S. 399 (1966). This is precisely true in this case.

3. This case also presents the question as to whether appellant must be accorded immunity from foreign prosecution, at least where he presents evidence that he has a real fear of such prosecution. It is suggested that Murphy v. Waterfront Commission, *supra*, adopted as our law the principle set forth in the English case of U.S.A. v. McRae, Lr. 3 Ch. App. 79 (1867), that:

"where there is a real danger of prosecution in a foreign country, the case could not be distinguished 'in principle from one where a witness is protected from answering any question which has a tendency to expose him to forfeiture for a breach of our own municipal law'" 378 U.S. at 67.

Appellant presented evidence to the trial court that he had been publicized as an "internationalist in crime" yet the court below held the danger was "too imaginary and insubstantial to sustain a refusal to answer."

4. This case also presents a substantial question as to whether the statutory procedures employed by the New Jersey Commission of Investigation meet minimal due process standards as enunciated by this Court in Jenkins v. McKeithen, — U.S. —, 23 L. Ed.2d 404 (1969). In determining what constitutional protections must be accorded to a witness before such a Commission the Court was there concerned with whether the Commission was "accusatory" in its nature or merely a fact-finding body whose sole purpose was to provide a basis for subsequent legislative action. The validity of such a truly fact-finding group had been upheld in Hannah v. Larche, 363 U.S. 420 (1960), which had dealt with the Civil Rights Commission. The Commission at issue in this case is a far cry from that under scrutiny in Hannah and, while lacking certain distinctive features of the Louisiana Commission in Jenkins, it is clearly sufficiently accusatorial in nature to call for those protections found to be required, by Jenkins.

The New Jersey Commission contains numerous hallmarks of prosecutorial agency. It has both the power and the duty to conduct wide-ranging investigations with respect to criminal law enforcement, N.J.S.A. 52:9M-2; cooperation with federal and state law enforcement officials is required, N.J.S.A. 52:9M-5, 9M-6, 9M-7; and the Commission is directed to refer evidence of crime to the appropriate prosecuting authorities, N.J.S.A. 52:9M-8. The Commission is also empowered to make public its findings as to organized crime and other aspects of criminal law enforcement. N.J. S.A. 52:9M-10. Furthermore, the Commission is given authority to conduct wiretapping and eavesdropping pursuant to N.J.S.A. 2A:156A-8, along

with the State Attorney General and the County Prosecutors, surely an unusual power for a legislative fact-finding body. Additionally, it may be noted that all of the Commission's staff members are former prosecutors, as is its Executive Director.

While the New Jersey Commission is not directed to name individuals guilty of specific crimes, as was the Louisiana Commission in Jenkins, the totality of the powers and duties of the New Jersey Commission serve to bring it much closer in specie to the Louisiana group than to the Civil Rights Commission sustained in Hannah. The fact that the Commission may recommend legislation, N.J.S.A. 52:9M-3(c), and make annual reports to the Governor and Legislature, N.J.S.A. 52:9M-10, does not alter its basic nature. As pointed out, appellant was called as a witness in what purported, according to his subpoena, to be a criminal investigation concerned with law enforcement in Long Branch, New Jersey, with particular reference to organized crime and racketeering. The questions asked of appellant in his appearance before the Commission likewise make clear the accusatorial nature of the proceedings. The New Jersey Supreme Court rejected this view, finding the Commission and its procedures sustainable on the authority of Hannah v. Larche, supra.

If indeed the Commission is accusatory in nature then it is clear that its procedures do not meet those minimal due process requirements set forth in Jenkins. Indeed, the New Jersey Commission provides even less protection than the Louisiana group. N.J.S.A. 52:13E-1 to 10. The awesome and wide-ranging powers given to this Commission

thus raise substantial questions under the Constitution and prior decisions of this Court.

5. Appellant was committed to jail until he should purge himself of contempt by testifying as ordered before the Commission. Neither within the statute or the Court's Order is there any termination date for the incarceration. In Shillitani v. United States, 384 U.S. 364 (1966), this Court sustained the use of a coercive imprisonment for civil contempt based upon refusal to answer questions before a federal grand jury. However, the Court specifically noted that the confinement had to be limited to the life of the grand jury since the justification for such imprisonment "depends upon the ability of the contemnor to comply with the Court's order," Id. at 371. No decision of this Court has ever sanctioned the indeterminate type of contempt sentence imposed in the present case. Presumably, if appellant is steadfast in his refusal to answer he will remain imprisoned for the rest of his life. The oft mentioned rationale that the witness carries the keys of his prison in his pocket is surely not a sufficient answer to the complex question this poses.

Judge Friendly recently expressed the thought that such an indefinite confinement of a non-complying accused would violate the Due Process Clause. United States v. Doe, 405 F.2d 436, 438 (2d Cir. 1968). One commentator has also noted that:

"once the defendant has decided to undergo the penalty rather than obey, the likelihood of effective coercion becomes increasingly

small and the accumulation of penalties may assume an excessively vindictive character." Note, Proceedures for Trying Contempts in Federal Courts, 73 Harv. L. Rev. 353, 358 (1959).

Such a disproportion between the punishment and the offense also raises serious and substantial questions under the Eighth Amendment, with its modern emphasis on civilized standards and "idealistic concepts of dignity," Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968).

These questions were directly raised in appellant's appeal to the New Jersey Supreme Court (App. B. 74-76), and in the trial court (8-25 to 9-13), but were not passed upon by the New Jersey Supreme Court in its decision. The question is substantial and of great public importance due to the increasing use of the contempt power in both state and federal proceedings.

6. The proceeding below constituted a serious abridgement of appellant's freedom of association and belief. These are rights, of course, which cannot be supplanted by a grant of immunity. Many of the questions asked of appellant before the Commission were of the "Do you know---" variety. Such questions sought, impermissibly, to probe into appellant's associations with others in a most general way. The questions were not directed to ascertaining whether the witness and the person inquired of were, or had been, engaged in any specific criminal enterprise, but, on their face, dealt merely with associations. Such inquiry would appear to be prohibited under Sweezy v. New Hampshire, 354 U.S. 234 (1957). The fact

that that case dealt with merely so-called political associations does not distinguish it, in principle, from the instant situation. Whether such an inquiry is to be permitted because the investigation deals with criminal matters presents a substantial question under the First Amendment.

Similarly, the questions sought to probe into appellant's beliefs, another area protected by the First Amendment, regardless of the nature of such questions. As Mr. Justice Douglas said in Brandenburg v. Ohio, ___ U.S. ___, 23 L. Ed. 2d 430, 439 (1969):

"One's beliefs have long been thought to be sanctuaries which government could not invade.... But I think that all matters of belief are beyond the reach of subpoenas or the probings of investigations. That is why the invasions of privacy made by investigating committees was notoriously unconstitutional."

Conclusion

It is submitted that the decision of the Supreme Court of New Jersey in sustaining the validity of the statutory procedure governing the State Commission of Investigation, its immunity power and its right to impose indefinite sentences for contempt, seriously erred in its interpretation of governing law. We believe that the questions presented by this appeal are not only substantial but are of immediate and grave public importance, so as to merit the filing of briefs on the merits and oral argument for their resolution.

Respectfully submitted,

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Appendix A

Opinion

SUPREME COURT OF NEW JERSEY
A-57/58/59 September Term 1969

In the Matters of)

JOSEPH ARTHUR ZICARELLI,)
ROBERT BASILE OCCHIPINTI, and)
ANTHONY RUSSO, Charged with)
Civil Contempt of the State)
Commission of Investigation.)

JOSEPH ARTHUR ZICARELLI,)
ROBERT BASILE OCCHIPINTI, and)
ANTHONY RUSSO,)

Appellants,)

v.)

THE NEW JERSEY STATE COM-)
MISSION OF INVESTIGATION,)

Respondent.)

Argued December 15, 1969 — Decided

On appeal from the Superior Court, Law Division, Mercer County.

Mr. Michael A. Querques argued the cause for appellant Zicarelli; Mr. Samuel D. Bozza argued the cause for appellant Occhipinti (Mr. Daniel E. Isles and Mr. Harvey Weissbard, of counsel and on the brief; Messrs. Querques Isles & Weissbard, attorneys for appellant Zicarelli).

Mr. William Pollack argued the cause for appellant Russo.

Mr. Wilbur H. Mathesius and Mr. Kenneth P. Zauber argued the cause for respondent.

The opinion of the Court was delivered by

WEINTRAUB, C. J.

Appellants refused to answer questions before the State Commission of Investigation (herein S.C.I.) and persisted in that refusal notwithstanding a grant of immunity. Upon the S.C.I.'s application to the Superior Court, each was ordered to be incarcerated until he answered. We certified their appeals before argument in the Appellate Division.

I.

Appellants contend the statute creating the S.C.I. denies due process of law in violation of the Fourteenth Amendment because individuals summoned before the Commission are denied the protections

accorded an accused by the Bill of Rights.¹ The argument rests upon the false premise that the role of the S.C.I. is to decide whether an individual has committed a crime and to publicize the verdict. That is not its mission.

For this reason, appellants' reliance upon Jenkins v. McKeithen, ___ U.S. ___, 23 L. ed. 2d 404 (1969), is misplaced. That case involved a Louisiana statute which created a body called the Labor-Management Commission of Inquiry. The Commission consisted of nine members appointed by the Governor. The Commission could act only upon referral by the Governor when, in his opinion, there was substantial indication of "widespread or continuing violations of existing criminal laws" affecting labor-management relations. Upon such referral the Commission was to proceed by public hearing to ascertain the facts, and was required to determine whether there was probable cause to believe such criminal violation had occurred. Such findings were to be sent to appropriate federal or state law enforcement officials, and although not evidential in any trial, the findings were to be made public and could include conclusions as to specific individuals.

In Jenkins the trial court dismissed the complaint on motion. Four members of the Court,

1. The S.C.I. contends that appellant Zicarelli is estopped to argue the constitutionality of the statute in its entirety or of the immunity provision because he was defeated on both scores in a proceeding in the United States District Court for the District of New Jersey and withdrew his appeal from the judgment there entered. We pass this objection since the issue must be met at the behest of the other appellants, and even as to Zicarelli "collateral estoppel" would not be a satisfying basis for decision.

in an opinion by Mr. Justice Marshall, thought there was enough to warrant a hearing upon the complaint and hence reversed the judgment; two members of the Court thought the statute was invalid on its face; and the remaining three voted to affirm the trial court's judgment upholding the statute.

Mr. Justice Marshall stressed that the Commission had no role whatever in the Legislative process. He pointed to the Commission's power to make public findings with respect to individual guilt of crime and cited the allegations in the complaint that the power was so used "to brand them as criminals in public" (___ U.S. at ___, 23 L. ed. 2d at 420). He continued that

"In the present context, where the Commission allegedly makes an actual finding that a specific individual is guilty of a crime, we think that due process requires the Commission to afford a person being investigated the right to confront and cross-examine the witnesses against him, subject only to traditional limitations on those rights. . . ."

and as well the right to call witnesses, subject to reasonable restrictions (___ U.S. at ___, 23 L. ed. 2d at 421). Finally the opinion emphasized that it did not hold that appellant was entitled to declaratory or injunctive relief but only that he was entitled to a chance "to prove at trial that the Commission is designed to and does indeed act in the manner alleged in his complaint, and that its procedures fail to meet the requirements of due process" (___ U.S. at ___, 23 L. ed. 2d

at 422).

It should be stressed that both the plurality opinion and the dissenting opinion unreservedly reaffirmed Hannah v. Larche, 363 U.S. 420, 4 L. ed. 2d 1307 (1960), which had rejected a similar attack upon the statute creating the Civil Rights Commission. Distinguishing Hannah, Mr. Justice Marshall in Jenkins said (___ U.S. at ___, 23 L. ed. 2d at 419-420):

"The appellants in Hannah were persons subpoenaed to appear before the Civil Rights Commission in connection with complaints about deprivations of voting rights. They objected to the Civil Rights Commission's rules about nondisclosure of the complainants and about limitations on the right to confront and cross-examine witnesses. This Court ruled that the Commission's rules were consistent with the Due Process Clause of the Fifth Amendment. The Court noted that '[d]ue process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.' 363 U.S. at 442, 4 L. Ed. 2d at 1321.

"In rejecting appellants' challenge to the Civil Rights Commission's procedures, the

Court placed great emphasis on the investigatory function of the Commission:

'[I]ts function is purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative and executive action.' 363 U.S. at 441, 4 L. Ed. 2d at 1320.

The Court noted that any adverse consequences to those being investigated, such as subjecting them to public opprobrium, were purely conjectural, and, in any case, were merely collateral and 'not . . . the result of any affirmative determinations made by the Commission. . . .' 363 U.S. at 443, 4 L. Ed. 2d at 1322."

The S.C.I. is in no sense an "accusatory" body within the meaning of Jenkins. Rather, in words which Jenkins repeated from Hannah, the purpose of the S.C.I. is "to find facts which may subsequently be used as the basis for legislative and executive action." This plainly appears from a review of the statute..

The S.C.I. consists of four members, two ap-

pointed by the Governor and one each by the President of the Senate and the Speaker of the General Assembly. N.J.S.A. 52:9M-1. Section 2 of the statute reads:

"The commission shall have the duty and power to conduct investigations in connection with:

a. The faithful execution and effective enforcement of the laws of the State, with particular reference but not limited to organized crime and racketeering;

b. The conduct of public officers and public employees, and of officers and employees of public corporations and authorities;

c. Any matter concerning the public peace, public safety and public justice."

Section 3 provides:

"At the direction of the Governor or by concurrent resolution of the Legislature the commission shall conduct investigations and otherwise assist in connection with:

a. The removal of public officers by the Governor;

b. The making of recommendations by the Governor to any other person or body, with respect to the removal of public officers;

c. The making of recommendations by the Governor to the Legislature with respect to changes in or additions to existing provisions of law required for the more effective enforcement of the law."

Section 4 requires the S.C.I to investigate any department or State agency at the direction or request of the Legislature or the Governor or such department or agency. Upon the request of the Attorney General, a county prosecutor or any other law enforcement official, the S.C.I. shall cooperate with, advise and assist them in the performance of their official powers and duties. Section 5. The S.C.I. shall cooperate with federal officials in the investigation of violations of federal laws within the State, section 6, and may consult and exchange information with officers of other States, section 7, and whenever it shall appear to the Commission that there is cause for the prosecution for a crime, or for the removal of a public officer for misconduct, the Commission shall refer the evidence to the officials authorized to conduct the prosecution or to remove the public officer Section 8.

The legislative mission of the S.C.I., evident in section 3 quoted above, is emphasized by section 10 which reads:

"The commission shall make an annual report to the Governor and Legislature which shall include its recommendations. The commission shall make such further interim reports to the Governor and Legislature, or either thereof, as it shall deem advisable, or as shall be required by the Governor or by concurrent resolution of the Legislature."

Section 11 does provide that

"By such means and to such extent as it shall deem appropriate, the commission shall

keep the public informed as to the operations of organized crime, problems of criminal law enforcement in the State and other activities of the commission."

but section 11 does not require the S.C.I. to make and publicize findings with respect to the guilt of specific individuals and thus does not invite the problem involved in Jenkins. In other words, the S.C.I. can respect the demands of due process without disobeying the letter or the spirit of the statute. Nor does the discretion given by section 12 to hold public hearings in any way mandate an infraction of any constitutional right. Under the statute the S.C.I. may, and under the Constitution it must, work within basic limits.

We add that nothing occurred in the present matter which suggests the S.C.I. intends to transgress those limits. The S.C.I. met the provisions of the Code of Fair Procedure (L. 1968, c. 376), N.J.S.A. 52:13E-1 to 10. A copy of that statute was served upon each appellant with the subpoena, and the subpoena contained a sufficient statement of the subject of the investigation.² N.J.S.A. 52:13E-2. The right to have counsel present and to receive his advice, N.J.S.A. 52:13E-3, was re-

2. It read:

"Whether the laws of New Jersey are being faithfully executed and effectively enforced in the City of Long Branch, New Jersey, with particular reference to organized crime and racketeering; whether public officers and public employees in the City of Long Branch and in Monmouth County where it is located, have been properly discharging their duties with particular reference to law enforcement and relations to criminal elements; and whether and to what extent criminal elements have infiltrated the political, economic and business life of those areas."

spected. The hearing was private. There has been no trace of a purpose to deny due process.

In sum, then, we have a typical commission created to discover and to publicize the state of affairs in a criminal area, to the end that helpful legislation may be proposed and receive needed public support. That the commission may also aid law enforcement by gathering evidence of crime and transmitting it to the appropriate agency for evaluation or prosecution does not militate against the power of the Legislature to seek the facts for its own purposes through such a commission. We do not suggest that a commission whose role was solely to aid the executive branch by ferretting out evidence of guilt for transmittal to the executive officers would be barred by the Federal Constitution. No provision of that instrument stands in the way. Nor do we understand appellants to say there is. The federal attack under the present point is based on the due process clause, and the result does not turn upon whether the agency is characterized as "legislative" or "executive" or both. Rather the question is whether the agency, whatever its classic nature in the context of separation of powers, has an accusatory role, and if so, whether individual rights pertinent to an accusatory function have been denied. As to this, the answer is that the role of the S.C.I. is not accusatory and the rights accorded the individuals concerned are appropriate and adequate in the light of the agency's mission and powers.

We add that the United States District Court for the District of New Jersey rejected the same attack in Sinatra v. New Jersey State Commission of Investigation, decided January 9, 1970.

II.

Appellants contend the statute violates Article III, § 1, which reads:

"The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others; except as expressly provided in this Constitution."

The gist of the complaint seems to be that the statute's division of the power of appointment between the legislative and executive branches offends the provisions of the State Constitution dealing with appointments to office.

Appellants say that if the S.C.I. is a legislative agency, the statute must fall because the power of appointment of two of the commissioners is allocated to the Governor. The power to appoint, as such, is not the special power of any one branch. Ross v. Board of Chosen Freeholders of the County of Essex, 69 N.J.L. 291, 294-296 (E. & A. 1903). The question then is whether there is something in the facts of this case which nonetheless requires the appointments to be made by the Legislature itself. We see no fundamental incongruity within the broad principle of Article III, § 1, quoted above, in permitting the Governor to appoint to a legislative agency. The Governor is a party to the legislative process. He is required to address the Legislature upon "the condition of the State"

and to "recommend such measures as he may deem desirable." Art. V, § I, ¶ 12. All bills must be presented to him for his approval or disapproval. Art. V, § I, ¶ 14. Hence it cannot offend the policy of Art. III, ¶ 1, to authorize the Governor to appoint to a "legislative" commission.

Nor does any constitutional provision dealing with the specific subject of appointments forbid that course. On the contrary, the stated restriction with respect to appointments is upon the legislative branch alone. Art. IV, § V, ¶ 5, provides that "Neither the Legislature nor either house thereof shall elect or appoint any executive, administrative or judicial officer except the State Auditor." See Richman v. Neuberger, 22 N.J. 28 (1956); Richman v. Ligham, 22 N.J. 40 (1956). Hence, if the S.C.I. is a legislative commission within the meaning of our State Constitution, no difficulty resides in the circumstance that the Governor shares the appointing power.

The alternative argument is that the S.C.I. must be deemed to be an executive agency and therefore the Legislature may not appoint because of the affirmative restriction upon a legislative appointment of any executive or administrative officer contained in Art. IV, § V, ¶ 5, referred to above. In contending the S.C.I. is "executive" appellants stress the authority given the S.C.I. by the statutory provisions quoted in Point I to investigate at the request and in aid of the Governor or officers within his branch of government.

The power to investigate reposes in all three branches. Eggers v. Kenny, 15 N.J. 107, 114-115

(1954). And, absent a threat to the essential integrity of the executive branch, see David v. Vesta Co., 45 N.J. 301, 326 (1965), the Legislature may investigate official performance within the executive branch, for it is the responsibility of the Legislature to legislate with respect to executive offices and their powers and duties. This being an appropriate area for legislative inquiry, it is of no significance that Art. V, § IV, ¶ 5, also empowers the Governor to investigate official performance within his department.

A separation-of-powers issue would arise only if the Legislature authorized the S.C.I. to go beyond investigation and to take action which invades an area committed exclusively to another branch. So, for example, if the S.C.I. were empowered to indict or to adjudicate charges of violation of our criminal laws, there would be an encroachment upon the judicial branch, David v. Vesta Co., *supra*, 45 N.J. at 326-327, and if the S.C.I. were authorized itself to prosecute criminal charges, the executive power would be involved. But the S.C.I. does none of this. Its investigations will at most yield material which may also be of interest to executive officials and be referred to them for handling. This being so, the S.C.I. is not vested with authority peculiarly executive in the sense of the separation-of-powers doctrine. Hence it cannot be said that the S.C.I. is an executive agency within the meaning of the provision barring legislative appointments of executive or administrative officers.

Nor does the statute offend Art. IV, § V, ¶ 2, which reads:

"The Legislature may appoint any commission, committee or other body whose main purpose is to aid or assist it in performing its functions. * * *

This provision appears to focus upon the power of appointment, and authorizes the Legislature to exercise that power if the "main purpose" is to aid or assist that branch of government and inferentially to deny that power if the "main purpose" is to aid or assist another branch.

We must assume the Legislature intended to abide by the Constitution and that the "main purpose" was to aid the legislative branch. That the S.C.I. is directed to investigate at the request of the Governor or agencies within his department does not point the other way. Notwithstanding the executive aid which may ensue, the legislative interest persists, for the legislative power touches all things, subject only to restraints the Constitution imposes. It being within the power of the Legislature to appoint to a commission to inquire into performance in public office, to trace the tentacles of crime in the public and the private sectors, and to inform the Legislature and the public to the end that the sufficiency of existing legislation or the need for remedial measures may be known, the legislative purpose remains dominant notwithstanding that the product of investigations will be available to the executive branch. The separation-of-powers doctrine contemplates that the several branches will cooperate to the end that government will succeed in its mission. It is consistent with the legislative responsibility to provide that a legislative agency shall investigate an area of legitimate legislative interest upon an

executive request or shall alert law enforcement agencies, state and federal, with respect to criminal events it uncovers. Hence the assistance to the executive branch, state and federal, does not dispute the premise that the "main purpose" of the S.C.I. is legislative.

III.

Appellants contend the immunity provision of the statute violates the Fifth Amendment guarantee that no person "shall be compelled in any criminal case to be a witness against himself."

N.J.S.A. 52:9M-17(b) provides that a person complying with the S.C.I.'s order to answer "shall be immune from having such responsive answer given by him or such responsive evidence produced by him, or evidence derived therefrom used to expose him to criminal prosecution or penalty or to a forfeiture of his estate." Several objections are raised to the constitutional sufficiency of this immunity.

The first is that the statute does not grant a "transactional" immunity, i.e., from prosecution for the offense to which the compelled testimony relates, but rather grants only a "testimonial" immunity, i.e., protection against the use of the compelled testimony and the fruits thereof leaving the witness subject to trial upon the basis of other evidence the State acquires independently of that testimony. We believe the statute need go no further.

Appellants rely upon Counselman v. Hitchcock, 142 U.S. 547, 35 L. ed. 1110 (1892). There the

statute protected the witness from the use of the evidence obtained from him but did not forbid the use of other evidence to which the witness's testimony might lead. The Court made it plain that the Fifth Amendment would not be satisfied unless the witness were also shielded from the evidence the prosecution uncovered by reason of the leads obtained from the witness, but in its final statement the Court spoke in terms which could be found to be more demanding. It said (142 U.S. at 585-586, 35 L. ed. at 1122):

"We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision; a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates. In this respect, we give our assent rather to the doctrine of Emery's Case, in Massachusetts, than to that of People v. Kelly, in New York; and we consider that the ruling of this court in Boyd v. United States, 116 U.S. 616, supports the view we take. Section 860, moreover, affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources

of information which may supply other means of convicting the witness or party."

The last sentence in this quotation observes that the statute did not protect against use of the fruit of the compelled testimony, and thus states a narrower basis for decision than the opening proposition that a statute will not suffice unless it grants an absolute immunity from prosecution.

The application of the self-incrimination clause to a defendant in a criminal proceeding is evident and simple, but the Constitution is read to protect as well a witness in every proceeding, and here difficulties arise. When the private interests of a witness are served by his silence; it is at the expense of litigants who need his testimony or at the expense of the State if the witness thereby withholds what the public needs to know in a judicial or legislative inquiry. Discordant values are involved, and the task is to reconcile their demands.

One approach could be to require the witness to answer and then to shield him from the use of the testimony thus compelled. We did that in a setting in which the good faith of the asserted fear of incrimination could not be tested. State v. De Cola, 33 N.J. 335 (1960). In general, however, the courts chose to permit the witness to refuse to answer, but since, if that right were absolute, the State could be denied evidence it needed for public prosecutions or investigations, the competing values were adjusted by requiring the witness to testify if the State conferred an immunity which would leave him no worse off than if his claim to silence had been allowed. On the

face of things, an immunity against prosecution would exceed what the Fifth Amendment protects, for the Fifth Amendment protects the witness only with respect to what the witness himself can furnish and not from evidence from other sources.

At the time Counselman was decided, the immunity question concerned only the jurisdiction which sought to compel testimony. Counselman dealt with a federal statute and with the restraint the Fifth Amendment imposed upon the federal government. Since then the Fifth Amendment has been found to apply to the States as well, and in addition the view has taken hold that evidence the federal government or a State obtains by forbidden compulsion may not be used by either jurisdiction. In that setting, the scope of the required immunity assumes new significance. If the immunity must protect against prosecution with respect to any offense, both state and federal, to which the testimony relates, the States would be unable to compel testimony no matter how urgent the public need since they could not immunize a witness from federal prosecution. And although the Congress can, in furtherance of federal investigations, bar state prosecutions, still, the State's responsibility and interest in criminal matters being usually more pervasive and demanding, it might be too high a price to pay. See Knapp v. Schweitzer, 357 U.S. 371, 378-379, 2 L. ed. 2d 1393, 1400 (1958). In this new setting, the more acceptable solvent is to protect the witness against the use of his compelled testimony by both jurisdictions but with each remaining free to prosecute on the basis of evidence independently obtained.

The problem was accordingly resolved in those

terms in Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 12 L. ed. 2d 678 (1964). The case involved a New Jersey statute which granted immunity from state prosecution but of course did not purport to protect the witness with respect to federal offenses. On the basis of prior decisions of the United States Supreme Court, we held the statute was valid even though the witness remained subject to federal prosecution. In re Application of Waterfront Commission of N.Y. Harbor, 39 N.J. 436 (1963). The United States Supreme Court agreed that the statute should be upheld, but upon the ground that the witness would indeed be protected in a federal prosecution by virtue of the Fifth Amendment itself. This conclusion had to reject the thesis that the Fifth Amendment required an immunity from prosecution rather than an immunity from the use of the coerced testimony. Indeed, Murphy read Counselman v. Hitchcock to have denounced the statute there involved, not because it failed to provide for immunity against prosecution, but because it did not protect the witness from the use of the fruit of the compelled testimony (387 U.S. at 78-79, 12 L. ed. 2d at 694-695). Murphy concluded in these words (378 U.S. at 79, 12 L. ed. 2d at 695):

* * * we hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the

interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. This exclusionary rule, while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity.

That Murphy rejected the view that the Fifth Amendment requires a grant of immunity from prosecution was emphasized in the concurring opinion of Mr. Justice White (378 U.S. at 93, 12 L. ed. 2d at 703).

In Albertson v. Subversive Activities Control Board, 382 U.S. 70, 15 L. ed. 2d 165 (1965), the Court, in summarizing Counselman v. Hitchcock, did include a reference in Counselman to "absolute immunity against future prosecution for the offence to which the question relates" but this issue was not in focus, and the opinion did not stop there, but rather pointed out that the immunity statute before it did not protect against the use of the compelled statement as evidence in all situations nor against the use of the leads it furnished (382 U.S. at 80, 15 L. ed. 2d at 172). The question whether an immunity against compelled testimony and its fruits is enough was left open in Stevens v. Marks, 383 U.S. 234, 244, 15 L. ed. 2d 724, 732 (1966). But in Gardner v. Broderick, 392 U.S. 273, 20 L. ed. 2d 1082 (1968), the Court said that "Answers may be compelled regardless of the

privilege if there is immunity from federal and state use of the compelled testimony or its fruit in connection with a criminal prosecution against the person testifying," citing both Counselman and Murphy (392 U.S. at 276, 20 L. ed. 2d at 1085). Thus the view of Murphy was reasserted.

We are satisfied that the Fifth Amendment does not require immunity from prosecution. An immunity of that breadth exceeds the protection the Fifth Amendment accords. More importantly, to find that demand in the Fifth Amendment would in practical terms deny state government access to facts it must have to meet its duty to secure the well-being of all the citizens. We heretofore deemed the Constitution to require immunity against use of testimony rather than immunity from prosecution, see State v. Spindel, 24 N.J. 395, 404-405 (1957); and recently our Legislature, in adopting the Model State Witness Immunity Act, substituted an immunity from use for an immunity from prosecution. See In re Addonizio, 53 N.J. 107, 114-115 (1968).

There is a difference in that Murphy dealt with a federal-state setting whereas we are here dealing with the claim that our statute does not protect a witness from prosecution under our state law. But the question in both is the same, i.e., what immunity the Fifth Amendment requires in exchange for compulsion to answer. The values involved are the same. We see no sensible basis for a different answer. Gardner v. Broderick treated the issue as one and the same, citing both Counselman and Murphy. Murphy held and Gardner repeated that the Fifth Amendment requires protection only from the use of the compelled

testimony and the leads it furnishes, and that protection our statute expressly provides. See United States v. McClosky, 273 F. Supp. 604 (S.D.N.Y. 1967); Application of Longo, 280 F. Supp. 185 (S.D.N.Y. 1967).

The remaining questions concerning self-incrimination may be disposed of quickly. It is contended the statutory immunity is inadequate because it does not protect a witness with respect to a prosecution in a sister State or in a foreign land. As to a sister State, it seems clear that if the Fifth Amendment requires protection against the use of the testimony by a sister State, the Amendment itself will provide that protection. Murphy can mean no less. United States v. McClosky, *supra*, 273 F. Supp. at 606; Application of Longo, *supra*, 280 F. Supp. 185; cf. In re Flanagan, 350 F. 2d 746, 747 (D.C. Cir. 1965). As to a foreign land, even if Murphy means that liability under foreign law is now relevant, the danger in the case before us is too imaginary and unsubstantial to sustain a refusal to answer. See Murphy, 378 U.S. at 67-68, 12 L. ed. 2d at 688.

Nor do we see substance to the complaint that our statute protects the witness only with respect to "responsive" answers or evidence. The limitation is intended to prevent a witness from seeking undue protection by volunteering what the State already knows or will likely come upon without the witness's aid. The purpose is not to trap. Fairly construed, the statute protects the witness against answers and evidence he in good faith believed were demanded.

IV.

The orders under review provide that appellants shall be incarcerated until they answer the questions they refused to answer. Appellants contend the statute authorizes only a penal prosecution for contempt of the Commission, for which a fixed sentence must be imposed.

With reference to "contempt" of court, we have tried to distinguish sharply between (1) the public offense, i.e., "contempt," for which the court may punish the offender and (2) the injured litigant's right to apply for relief to satisfy his private claim arising out of the same offending act or omission. New Jersey Department of Health v. Roselle, 34 N.J. 331 (1961); In re Application of Waterfront Comm. of N.Y. Harbor, *supra*, 39 N.J. at 466; In re Carton, 48 N.J. 9, 19-24 (1966); In re Buehrer, 50 N.J. 501, 515-516 (1967). The procedure and rights of the person concerned depend very much upon the purpose of the proceeding, and hence our rule of court prescribes the processes carefully to the end that he may know at once whether he is to meet a penal charge or the civil claim of a litigant, and may be afforded the rights appropriate to the proceeding. R. 1:10-1 to 5.

It would be helpful if legislative draftsmen abided by our semantics, but we cannot insist that they shall. Our responsibility remains to find and enforce the legislative intent.

N.J.S.A. 52:9M-17b provides that a person given immunity "may nevertheless be prosecuted for any perjury committed in such answer or in producing such evidence, or for contempt for failing to give

an answer or produce evidence in accordance with the order of the Commission. * * *," Appellants insist this language contemplates a penal prosecution and nothing else. But the sense of the situation goes strongly against that limitation, for the mission of the S.C.I. is to obtain facts for the Legislature and the mere punishment of a recalcitrant witness would not achieve that end.

We can think of no reason why the Legislature would want to permit a witness to block the inquiry if he is willing to accept a penalty. Mindful, as we are, that the expression "prosecution for contempt" has been used widely to describe a proceeding arising out of contumacy, whether the object of the proceeding is to compel compliance or to punish for noncompliance or both, we must seek the legislative design in that light, notwithstanding that the terms employed are not the ones we prefer. Here we have no doubt that the Legislature intended the S.C.I. to obtain the facts, whatever the wish of the person subpoenaed. The very provision for a grant of immunity repels the notion that a witness may choose to be silent for a price.

Nor is it critical whether the statutory language fits snugly within our rule of court relating to judicial proceedings in aid of subpoenas of a public officer or agency. R. 1:9-6. Subsection (a) deals with ex parte applications for compliance, subsection (b) with applications for compliance made on notice, and (c) with applications to "punish" where a statute authorizes that course. These provisions were intended to reflect statutory provisions of which the draftsmen of the rule were aware. Needless to say, the rule does not

mean that the judiciary will withhold its hand unless the statute falls within the language of the rule. R. 1:1-2 provides that "In the absence of rule, the court may proceed in any manner compatible" with the purpose "to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." Here appellants were plainly informed that the objective of the proceedings was to have them jailed until they complied with the order of the S.C.I. There can be and there is no complaint on that score.

We should add some further observations. The section of the statute here involved deals with defiance of the order of the S.C.I. itself rather than with defiance of an order obtained by the agency from a court. We see no difficulty in the circumstance that the statute does not call for an intermediate order by a court to be followed by enforcement of the court's mandate, but we point out that the absence of such an intermediate step does not deny a witness the opportunity to have the court pass upon the validity of the agency's order to answer. There was no misunderstanding here in that regard. Appellants were heard fully upon the propriety of the questions. They do challenge the validity of certain questions but there is no charge that the hearing before the trial court upon those objections was inadequate.

V.

The remaining issues warrant little more than mention.

Zicarelli and Occhipinti charge that the ques-

tions put to them offended their freedom of association guaranteed by the First Amendment. Sweezy v. New Hampshire, 354 U.S. 234, 1 L. ed. 2d 1311 (1957), which they cite, dealt with a legislative inquiry into political associations. Here the questions relate to an allegedly massive criminal organization, and to the witness's associations in that context. The subject matter is incontestably criminal and the interest of the State is manifest. We see no affront to the values protected by the First Amendment.

Appellants complain that the questions "sought to probe into the most secret recesses of the witness' minds and to expose these private thoughts to public view," and this they say is barred by the Fourth Amendment, alone or in conjunction with the First and Fifth Amendments. Granted the right of the Legislature to inquire, the pertinency of the questions and the sufficiency of the immunity with respect to self-incrimination, all of which must be accepted for the immediate purpose, the proposition advanced, simply stated, is that the Constitution prohibits a subpoena to a mere witness. It is plainly frivolous.

Appellants' reliance upon the Sixth Amendment appears to raise no issue beyond the due process question discussed in "I" above.

Their further claim that if the statute is valid, it nonetheless has been so applied or implemented as to violate the Constitution has no basis.

The trial court properly refused to permit an examination of the Executive Director of the S.C.I. as to whether the agency already had the informa-

tion it sought from appellants or whether the S.C.I. was following a path revealed by illegal wire-taps or bugging. As to the first, it would be an unwarranted interference with the legislative branch thus to superintend its exercise of its constitutional authority to investigate. It is difficult to conceive of a showing which would justify that course. Surely nothing before us suggests a serious issue in that regard.

With respect to the effort to learn whether evidence illegally obtained prompted the legislative investigation or the questions put to appellants, they cite no authority for the extraordinary proposition that such illegality will taint the legislative process. The suppression of the truth because it was discovered by a violation of a constitutional guarantee is a judge-made sanction to deter insolence in office. It is invoked in penal proceedings, and then only at the behest of a defendant whose right was violated. Farley v. \$168,400.97, 55 N.J. 31, 47 (1969). Even there, the wisdom of a suppression of the truth is not universally acknowledged. Farley, supra, 55 N.J. at 50. Appellants ask us to go further, and to suppress the truth on behalf of a mere witness, to the end that he may choose to be silent. Still more, appellants ask that we visit the sanction upon the legislative process, even though that process cannot result in a judgment against them. Pressed relentlessly and without regard to all other values, the sanction thesis could indeed deny the Legislature access to facts, and even taint a statute adopted in response to facts illegally revealed, but we think such an extension would be absurd.

Finally, Russo asserts the questions put to him

are improper because they allegedly enter an area in which he has been convicted of perjury. The conviction, as described in his brief, was for perjury in denying to a grand jury that he had said to a policeman that he, Russo, had the Mayor and some councilmen of the City of Long Branch "in his pocket." We do not see a problem. His testimony before the S.C.I. could not be used in a retrial of that perjury charge. Nor do the questions here involved include the one which led to the conviction, so as to raise the prospect that if Russo repeats his former testimony he will be indicted on a fresh charge of perjury. We need not anticipate issues such an indictment might raise.

The orders are affirmed.

(Stamped A TRUE COPY)
John H. Gildea, Clerk

Appendix B

Chapter 9 M. State Commission of Investigation

[New]

Sec.

- 52:9M-1. Creation of commission; membership; compensation; vacancies.
- 52:9M-2. Duties and powers.
- 52:9M-3. Investigation of public officers.
- 52:9M-4. Investigation of departments or agencies.
- 52:9M-5. Cooperation with law enforcement officials.
- 52:9M-6. Investigations of federal law violations.
- 52:9M-7. Law enforcement problems extending into other states.
- 52:9M-8. Referral of evidence of officers crime or misconduct to officials for prosecution or removal.
- 52:9M-9. Employment of personnel; duties; compensation.
- 52:9M-10. Annual report; recommendations; interim reports.
- 52:9M-11. Informing public of commissions activities.
- 52:9M-12. Authority of commission.
- 52:9M-13. Construction of sections 2 through 12 of act.
- 52:9M-14. Cooperation and assistance of state departments and agencies.
- 52:9M-15. Disclosure of name of witness or information.
- 52:9M-16. Exhibits; impounding by court.
- 52:9M-17. Immunity to criminal prosecution or penalty.
- 52:9M-18. Partial invalidity.

L.1968, c. 266, effective until December 31, 1974, see note under § 52:9M-1.

52:9M-1 STATE GOVERNMENT

52:9M-1. Creation of commission; membership; compensation; vacancies

There is hereby created a temporary State Commission of Investigation. The Commission shall consist of 4 members, to be known as commissioners.

Two members of the commission shall be appointed by the Governor, one by the President of the Senate and one by the Speaker of the General Assembly, each for 5 years. The Governor shall designate one of his appointees to serve as chairman of the commission.

The members of the commission appointed by the President of the Senate and the Speaker of the General Assembly and at least one of the members appointed by the Governor shall be attorneys admitted to the bar of this State. No member or employee of the commission shall hold any other public office or public employment. Not more than 2 of the members shall belong to the same political party.

Each member of the commission shall receive an annual salary of \$15,000.00 and shall also be entitled to reimbursement for his expenses actually and necessarily incurred in the performance of his duties, including expenses of travel outside of the State.

Vacancies in the commission shall be filled

for the unexpired term in the same manner as original appointments. A vacancy in the commission shall not impair the right of the remaining members to exercise all the powers of the commission.

L.1968, c. 266, § 1, eff. Sept. 4, 1968.

Duration of Act:

Section 20 of L.1968, c. 266, provided: "This act shall take effect immediately and remain in effect until December 31, 1974."

Title of Act:

An Act creating a temporary State Commission of Investigation; prescribing its functions, powers and duties; making an appropriation therefor. L. 1968, c. 266.

52:9M-2. Duties and powers

The commission shall have the duty and power to conduct investigations in connection with:

a. The faithful execution and effective enforcement of the laws of the State, with particular reference but not limited to organized crime and racketeering;

b. The conduct of public officers and public employees, and of officers and employees of public corporations and authorities;

c. Any matter concerning the public peace, public safety and public justice.

L.1968, c. 266, § 2, eff. Sept. 4, 1968.

52:9M-3. Investigation of public officers

At the direction of the Governor or by concurrent resolution of the Legislature the commission shall conduct investigations and otherwise assist in connection with:

a. The removal of public officers by the Governor;

b. The making of recommendations by the Governor to any other person or body, with respect to the removal of public officers;

c. The making of recommendations by the Governor to the Legislature with respect to changes in or additions to existing provisions of law required for the more effective enforcement of the law.

L.1968, c. 266, § 3, eff. Sept. 4, 1968.

52:9M-4. Investigation of departments or agencies

At the direction or request of the Legislature by concurrent resolution or of the Governor or of the head of any department, board, bureau, commission, authority or other agency created by the State, or to which the State is a party, the commission shall investigate the management or affairs of any such department, board, bureau, commission, authority or other agency.

L.1968, c. 266, § 4, eff. Sept. 4, 1968.

52:9M-5. Cooperation with law enforcement officials

Upon request of the Attorney General, a county prosecutor or any other law enforcement official, the commission shall co-operate with, advise and assist them in the performance of their official powers and duties.

L.1968, c. 266, § 5, eff. Sept. 4, 1968.

52:9M-6. Investigations of federal law violations

The commission shall co-operate with departments and officers of the United States Government in the investigation of violations of the Federal laws within this State.

L.1968, c. 266, § 6, eff. Sept. 4, 1968.

52:9M-7. Law enforcement problems extending into other states

The commission shall examine into matters relating to law enforcement extending across the boundaries of the State into other States; and may consult and exchange information with officers and agencies of other States with respect to law enforcement problems of mutual concern to this and other States.

L.1968, c. 266, § 7, eff. Sept. 4, 1968.

52:9M-8. Referral of evidence of officers crime or misconduct to officials for prosecution or removal

Whenever it shall appear to the commission that there is cause for the prosecution for a crime, or for the removal of a public officer for misconduct, the commission shall refer the evidence of such crime or misconduct to the officials authorized to conduct the prosecution or to remove the public officer.

L.1968, c.266, § 8, eff. Sept. 4, 1968.

52:9M-9. Employment of personnel; duties; compensation

The commission shall be authorized to appoint and employ and at pleasure remove an executive director, counsel, investigators, accountants, and such other persons as it may deem necessary, without regard to civil service; and to determine their duties and fix their salaries or compensation within the amounts appropriated therefor. Investigators and accountants appointed by the commission shall be and have all the powers of peace officers.

L.1968, c. 266, § 9, eff. Sept. 4, 1968.

52:9M-10. Annual report; recommendations; interim reports

The commission shall make an annual report to the Governor and Legislature which shall include its recommendations. The commission shall make such further interim reports to the Governor and Legislature, or either thereof, as it shall deem advisable, or as shall be required by the Governor or by concurrent resolution of the Legislature.

L.1968, c. 266, § 10, eff. Sept. 4, 1968.

52:9M-11. Informing public of commissions activities

By such means and to such extent as it shall deem appropriate, the commission shall keep the public informed as to the operations of organized crime, problems of criminal law enforcement in the State and other activities of the commission.

L.1968, c. 266, § 11, eff. Sept. 4, 1968.

52:9M-12. Authority of commission

With respect to the performance of its functions, duties and powers and subject to the limitation contained in paragraph d of this section, the commission shall be authorized as follows:

a. To conduct any investigation authorized by this act at any place within the State; and to maintain offices, hold meetings and function at any place within the State as it may deem necessary;

b. To conduct private and public hearings, and to designate a member of the commission to preside over any such hearing;

c. To administer oaths or affirmations, subpoena witnesses, compel their attendance, examine them under oath or affirmation, and require the production of any books, records, documents or other evidence it may deem relevant or material to an investigation; and the commission may desig-

nate any of its members or any member of its staff to exercise any such powers;

d. Unless otherwise instructed by a resolution adopted by a majority of the members of the commission, every witness attending before the commission shall be examined privately and the commission shall not make public the particulars of such examination. The commission shall not have the power to take testimony at a private hearing or at a public hearing unless at least 2 of its members are present at such hearing;

e. Witnesses summoned to appear before the commission shall be entitled to receive the same fees and mileage as persons summoned to testify in the courts of the State.

If any person subpoenaed pursuant to this section shall neglect or refuse to obey the command of the subpoena, any judge of the Superior Court or of a County Court or any municipal magistrate may, on proof by affidavit of service of the subpoena, payment or tender of the fees required and of refusal or neglect by the person to obey the command of the subpoena, issue a warrant for the arrest of said person to bring him before the judge or magistrate, who is authorized to proceed against such person as for a contempt of court.

L.1968, c. 266, § 12, eff. Sept. 4, 1968. Amended by L.1969, c. 67, § 1, eff. May 28, 1969.

52:9M-13. Construction of sections 2 through 12 of act

Nothing contained in sections 2 through 12 of this act shall be construed to supersede, repeal or limit any power, duty or function of the Governor or any department or agency of the State, or any political subdivision thereof, as prescribed or defined by law.

L.1968, c. 266, § 13, eff. Sept. 4, 1968. Amended by L.1969, c. 67, eff. May 28, 1969.

52:9M-14. Cooperation and assistance of state departments and agencies

The commission may request and shall receive from every department, division, board, bureau, commission, authority or other agency created by the State, or to which the State is a party, or of any political subdivision thereof, co-operation and assistance in the performance of its duties.

L.1968, c. 266, § 14, eff. Sept. 4, 1968.

52:9M-15. Disclosure of name of witness or information

Any person conducting or participating in any examination or investigation who shall disclose to any person other than the commission or an officer having the power to appoint one or more of the commissioners the name of any witness examined, or any information obtained or given upon such examination or investigation, except as directed by the Governor or commission, shall be adjudged a disorderly person.

Any statement made by a member of the commission or an employee thereof relevant to any

proceedings before or investigative activities of the commission shall be absolutely privileged and such privilege shall be a complete defense to any action for libel or slander.

L.1968, c. 266, § 15, eff. Sept. 4, 1968. Amended by L.1969, c. 67, § 3, eff. May 28, 1969.

52:9M-16. Exhibits; Impounding by court

Upon the application of the commission, or a duly authorized member of its staff, the Superior Court or a judge thereof may impound any exhibit marked in evidence in any public or private hearing held in connection with an investigation conducted by the commission, and may order such exhibit to be retained by, or delivered to and placed in the custody of, the commission. When so impounded such exhibit shall not be taken from the custody of the commission, except upon further order of the court made upon 5 days' notice to the commission or upon its application or with its consent.

L.1968, c. 266, § 16, eff. Sept. 4, 1968.

52:9M-17. Immunity to criminal prosecution or penalty

a. If, in the course of any investigation or hearing conducted by the commission pursuant to this act, a person refuses to answer a question or questions or produce evidence of any kind on the ground that he will be exposed to criminal prosecution or penalty or to a forfeiture of his estate thereby, the commission may order the person to answer the question or questions or produce the requested evidence and confer immunity as in

this section provided. No order to answer or produce evidence with immunity shall be made except by resolution of a majority of all the members of the commission and after the Attorney General and the appropriate county prosecutor shall have been given at least 24 hours written notice of the commission's intention to issue each order and afforded an opportunity to be heard in respect to any objections they or either of them may have to the granting of immunity.

b. If upon issuance of such an order, the person complies therewith, he shall be immune from having such responsive answer given by him or such responsive evidence produced by him, or evidence derived therefrom used to expose him to criminal prosecution or penalty or to a forfeiture of his estate, except that such person may nevertheless be prosecuted for any perjury committed in such answer or in producing such evidence, or for contempt for failing to give an answer or produce evidence in accordance with the order of the commission; and any such answer given or evidence produced shall be admissible against him upon any criminal investigation, proceeding or trial against him for such perjury, or upon any investigation, proceeding or trial against him for such contempt.

L.1968, c. 266, § 17, eff. Sept. 4, 1968.

52:9M-18. Partial invalidity

If any section, clause or portion of this act shall be unconstitutional or be ineffective in whole or in part, to the extent that it is not unconstitutional or ineffective it shall be valid and effective.

and no other section, clause or provision shall on account thereof be deemed invalid or ineffective.

L.1968, c. 266, § 18, eff. Sept. 4, 1968.

CHAPTER 13E. INVESTIGATING AGENCIES, CODE OF FAIR PROCEDURE [NEW]

Sec.

- 52:13E-1. Definitions.**
- 52:13E-2. Personal service.**
- 52:13E-3. Right to counsel; submission of proposed questions.**
- 52:13E-4. Records of public hearings; copies.**
- 52:13E-5. Sworn statement by witness; incorporation in the record.**
- 52:13E-6. Persons affected by proceedings; appearance or statement of facts.**
- 52:13E-7. Rights or privileges granted by agencies.**
- 52:13E-8. Dissemination of evidence adduced at private hearing.**
- 52:13E-9. Hearing conducted by temporary state commission.**
- 52:13E-10. Right of members to file statement of minority views.**

52:13E-1. Definitions

As used in this act:

(a) "Agency" means any of the following while engaged in an investigation or inquiry: (1) the Governor or any person or persons appointed by him, acting pursuant to P.L. 1941, c. 16, s. 1

(C. 52:15-7), (2) any temporary State commission or duly authorized committee thereof having the power to require testimony or the production of evidence by subpoena, or (3) any legislative committee or commission having the powers set forth in Revised Statutes 52:13-1.

(b) "Hearing" means any hearing in the course of an investigatory proceeding (other than a preliminary conference or interview at which no testimony is taken under oath) conducted before an agency at which testimony or the production of other evidence may be compelled by subpoena or other compulsory process.

(c) "Public hearing" means any hearing open to the public, or any hearing, or such part thereof, as to which testimony or other evidence is made available or disseminated to the public by the agency.

(d) "Private hearing" means any hearing other than a public hearing.

L.1968, c. 376, § 1, eff. Dec. 27, 1968.

Title of Act:

An Act establishing a code of fair procedure to govern State investigating agencies and providing a penalty for certain violations thereof. L.1968, c. 376.

Library references

Administrative Law and Procedure
(key) 341 et seq.

States (key) 34, 39 1/2, 43, 66 et seq.

C.J.S. Public Administrative Bodies and Procedure
§ 78.

C.J.S. States §§ 42, 42 et seq., 45-47, 58 et seq.,
81.

Words and Phrases (Perm. Ed.)

52:13E-2. Personal service

No person may be required to appear at a hearing or to testify at a hearing unless there has been personally served upon him prior to the time when he is required to appear, a copy of this act, and a general statement of the subject of the investigation. A copy of the resolution, statute, order or other provision of law authorizing the investigation shall be furnished by the agency upon request therefor by the person summonsed.

L.1968, c. 376, § 2, eff. Dec. 27, 1968.

52:13E-3. Right to counsel; submission of proposed questions

A witness summoned to a hearing shall have the right to be accompanied by counsel, who shall be permitted to advise the witness of his rights, subject to reasonable limitations to prevent obstruction of or interference with the orderly conduct of the hearing. Counsel for any witness who testifies at a public hearing may submit proposed questions to be asked of the witness relevant to the matters upon which the witness has been questioned and the agency shall ask the witness such of the questions as it may deem appropriate to its inquiry.

L.1968, c. 376, § 3, eff. Dec. 27, 1968.

52:13E-4. Records of public hearings; copies

A complete and accurate record shall be kept of each public hearing and a witness shall be entitled to receive a copy of his testimony at such hearing at his own expense. Where testimony which a witness has given at a private hearing becomes relevant in a criminal proceeding in which the witness is a defendant, or in any subsequent hearing in which the witness is summoned to testify, the witness shall be entitled to a copy of such testimony, at his own expense, provided the same is available, and provided further that the furnishing of such copy will not prejudice the public safety or security.

L.1968, c. 376, § 4, eff. Dec. 27, 1968.

52:13E-5. Sworn statement by witness; Incorporation in the record

A witness who testifies at any hearing shall have the right at the conclusion of his examination to file a brief sworn statement relevant to his testimony for incorporation in the record of the investigatory proceeding.

L.1968, c. 376, § 5, eff. Dec. 27, 1968.

52:13E-6. Persons affected by proceedings; appearance or statement of facts

Any person whose name is mentioned or who is specifically identified and who believes that testi-

mony or other evidence given at a public hearing or comment made by any member of the agency or its counsel at such a hearing tends to defame him or otherwise adversely affect his reputation shall have the right, either to appear personally before the agency and testify in his own behalf as to matters relevant to the testimony or other evidence complained of, or in the alternative at the option of the agency, to file a statement of facts under oath relating solely to matters relevant to the testimony or other evidence complained of, which statement shall be incorporated in the record of the investigatory proceeding.

L.1968, c. 375, § 6, eff. Dec. 27, 1968.

52:13E-7. Rights or privileges granted by agencies

Nothing in this act shall be construed to prevent an agency from granting to witnesses appearing before it, or to persons who claim to be adversely affected by testimony or other evidence adduced before it, such further rights and privileges as it may determine.

L.1968, c. 376, § 7, eff. Dec. 27, 1968.

52:13E-8. Dissemination of evidence adduced at private hearing

Except in the course of subsequent hearing which is open to the public, no testimony or other evidence adduced at a private hearing or preliminary conference or interview conducted before a single-member agency in the course of its investigation shall be disseminated or made avail-

able to the public by said agency, its counsel or employees without the approval of the head of the agency. Except in the course of a subsequent hearing open to the public, no testimony or other evidence adduced at a private hearing or preliminary conference or interview before a committee or other multi-member investigating agency shall be disseminated or made available to the public by any member of the agency, its counsel or employees, except with the approval of a majority of the members of such agency. Any person who violates the provisions of this subdivision shall be adjudged a disorderly person.

L.1968, c. 376, § 8, eff. Dec. 27, 1968.

52:13E-9. Hearing conducted by temporary state commission

No temporary State commission having more than 2 members shall have the power to take testimony at a public or private hearing unless at least 2 of its members are present at such hearing.

L.1968, c. 376, § 9, eff. Dec. 27, 1968.

52:13E-10. Right of members to file statement of minority views

Nothing in this act shall be construed to affect, diminish or impair the right, under any other provision of law, rule or custom, of any member or group of members of a committee or other multi-member investigating agency to file a statement or statements of minority views to accompany and be released with or subsequent to the report of the committee or agency.

L.1968, c. 376, § 10, eff. Dec. 27, 1968.